

TRAINING BULLETIN: SPRING, 2002
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COMMITTEE FOR PUBLIC COUNSEL SERVICES
TRAINING UNIT
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I. MESSAGE FROM THE CHIEF COUNSEL

Fiscal Year 2002 Funding:

On April 23, 2002, Governor Swift filed a request for supplemental FY02 appropriations, which included our requested \$7.949 million for anticipated spending in the areas of criminal case private counsel compensation, civil case private counsel compensation, and indigent court cost expenses. To have secured our requested amount from the Governor's Office in this fiscally brutal year is a high tribute to CPCS General Counsel Anthony Benedetti, Deputy Chief Counsel Pat Wynn and CFO Dick Janisch, whose experience and credibility made this accomplishment possible. Assuming that the Legislature proceeds to approve this request, which is part of a \$370.8 million package, we will be well on our way to full funding for all FY02 services in all our spending accounts. Pat and Anthony will keep you informed of key developments as they occur.

FY03 Budget Process:

This volatile and uncertain process begins in earnest on April 25, when the House Ways and Means Committee is expected to release its dramatically reduced, "no new taxes" budget proposal for fiscal year 2003. This to be followed by a debate on taxes the week of April 29, then by formal House consideration of the budget during the week of May 6. We have been and will continue to be advocating strongly for adequate funding for CPCS services. At the same time, we have been planning at the staff and operations level, in the event that we suffer significant reductions in the final FY03 budget. We anticipate many twists and turns during this year's budget process, and we will do our best to keep you advised.

Conference on Wrongful Convictions:

On April 19 and 20, I attended a conference in Cambridge which highlighted many cases of rank injustice, in which innocent persons were wrongfully convicted of serious crimes, both here in Massachusetts and elsewhere. These horrifying cases not only remind us of the unique importance of the jobs we do: they also renew and reinforce our determination that every lawyer who represents an indigent criminal defendant client in Massachusetts provides that client with thorough, zealous and compassionate representation - without exception, in every case. In addition, the conference proved the urgent need for deep-seated criminal justice reform in Massachusetts. No one who attended this conference could doubt that standards for eyewitness identifications and unrecorded defendants'

“statements” must be established and enforced, if our system of criminal justice is to become what it purports to be. We intend to begin working now with other individuals and organizations to craft a comprehensive Innocence Protection Act for Massachusetts, for consideration by the legislature in its 2003 session. Please contact Pat Wynn, Andy Silverman, Cathy Bennett, Anthony Benedetti or me if you would like to devote some time and energy to this effort.

II. TRAINING UNIT NEWS

Jury Skills

Congratulations to the graduates of the 2002 CPCS Jury Skills Course held at the Boston Office in April. It was a fun and challenging week. We are grateful to everyone who participated for their generosity of spirit, talent, and creativity. Our sincere thanks goes out to the faculty who gave up their time to teach and coach. Once again, this year's week long trials ended in victory: Evan Meachum was acquitted of the rape charge and Ed Simmons was found not guilty of robbing the First National Savings Bank.

This year's graduates were:

Corinne Diana, Ethan Schaff, Liam Scully, Arvett Bradford, Charles Alpert, Ernest Henderson, Peter Parlow, Kristen Wigandt, Michael D'Amore, David McDonough, Keith Higgins, Martin Kallio, James Mahoney, Stephanie Stolk-Raymond, Michael Vitali, Jennifer Willis, Paul Rudof, Andrea DeVries, Valerie Weldon, and Ben McGowen

Training Conference

There are still a few spots open at the 2002 CPCS Annual Training Conference. You can download a registration form at www.state.ma.us/cpcs/training. Hurry!! Capacity is limited. The conference will be held at the Worcester Centrum Centre in Worcester MA on Friday, May 10, 2002 from 8:30 a.m. to 4:30 p.m. The keynote speaker is Annabelle Hall of Reno, NV who will speak on Interviewing and Cross-Examination of Child Sexual Assault Victims. Other conference topics include Discovery of Privileged Records of Commonwealth Witnesses; SDP Statistics; Representing and Defending Against the Witness with Fifth Amendment Issues; A Discussion of Recent Research into Kids Understanding of Court Proceedings; Daubert Challenges Across the Spectrum; Effective Litigation Tactics for Kinship Placement, Custody & Adoption; and Hot Topics in Criminal Law.

III. INDIGENT DEFENSE NEWS

Appellate Attorneys:

DO YOU EVER WONDER WHAT YOUR PEERS ARE UP TO?

Join Us for the 1st Appellate Attorney Get-Together Lunch

Monday, June 24, 2002, 1:00 p.m., P. F. Chang's, 8 Park Plaza (bet. Boylston & Stuart Sts., near the theater district) Boston (617) 573-0821

Parking is available in the Transportation Bldg. & under the Commons

Near the Park St. or Boylston St. Green line T stops

In the most recent training bulletin, we announced plans to create an opportunity for panel appellate attorneys to get together for educational, networking, and information-sharing purposes. A number of you responded, so we are starting with a luncheon on Monday, June 24, 2002.

Please RSVP so that we can make the reservations. P.F. Chang's is a Chinese restaurant, with most lunch specials ranging from \$7 - \$10.

Hope many of you can make it. PLEASE RSVP by Friday, June 14th to Bonny Gilbert at ygilbert@tiac.net The plans for the second get-together is for after-work, in September, outside of Boston.

IV. LEGISLATIVE UPDATES

Chapter 13 of the Acts of 2002 - An Act Further Defining the Crime of Incest

This legislation strikes out section 17 in Chapter 272 and replaces it with a new section. The new section broadens the definition of incest by adding the following language:

"oral or anal intercourse, fellatio, cunnilingus, or other penetration of a part of a person's body, or insertion of an object into the genital or anal opening of another person's body, or the manual manipulation of the genitalia of another person's body".

This act will take effect on May 1, 2002.

Chapter 35 of the Acts of 2002 - An Act Relative to the Crimes of Assault and Battery and Assault and Battery By Means of a Dangerous Weapon

This legislation creates the new crime of "aggravated assault" by striking out the existing 13A and inserting in its place a new section 13A in Chapter 265. The new law does the following:

- Increase the financial penalty for simple assault or assault and battery from \$500 to \$1000;
 - Creates a new condition whereby someone who commits an assault or assault and battery:
 - (i) upon another which results in serious bodily injury;
 - (ii) upon another who is pregnant at the time of the assault and battery, knowing or having reason to know that the person is pregnant; or
 - (iii) upon another who he knows has an outstanding court order pursuant to section 18, 34B or 34C of chapter 208; section 32 of chapter 209; section 3, 4 or 5 of chapter 209A; and,
- section 15 or 20 of chapter 209C, in effect against him at the time of the assault or assault and battery

The penalty would be not more than 5 years in state prison or not more than 2 1/2 years in the house of correction, or by fines of not more than \$5,000, or by both.

The legislation also amends section 15A of Chapter 265 by striking subsection (b) and inserting in place a new subsection that does the following:

- Adds the option of a \$5,000 penalty for the crime of ABDW;
 - Creates a new condition whereby someone who commits an ABDW:
 - (i) upon another which results in serious bodily injury;
 - (ii) upon another who is pregnant at the time of the assault and battery, knowing or having reason to know that the person is pregnant; or
 - (iii) upon another who he knows has an outstanding court order pursuant to section 18, 34B or 34C of chapter 208; section 32 of chapter 209; section 3, 4 or 5 of chapter 209A; and,
- section 15 or 20 of chapter 209C, in effect against him at the time of the assault and battery

(iv) and is 17 years or older and commits the assault and battery upon a child under the age of 14

The penalty would be not more than 15 years in state prison or not more than 2 1/2 years in the house of correction, or by fines of not more than \$10,000, or by both.

This law will take effect on May 23, 2002.

IV. CASENOTES

The following notes summarize opinions released by the Supreme Judicial Court and the Appeals Court in November and December, 2001, and January, 2002. Always Shepardize! Applications for further appellate review may have been granted after the publication date of these notes. Furthermore, opinions may be "amended," sua sponte, or upon motion of a party. The Training Unit gratefully acknowledges James Hammerschmith, Esq. for writing the casenotes for this edition.

ADMISSIONS AND CONFESSIONS: JUVENILE, INTERESTED ADULT RULE

In *Commonwealth v. Alfonso A.*, 53 Mass. App. Ct. 279 (2001), further app. rev. granted, 436 Mass. 1101 (2002), police asked the fifteen-year-old defendant several times if he wanted to have his mother present or consult with one of the adults who were nearby (a co-defendant's mother and two other unrelated adults) before questioning. Each time, the juvenile responded that he did not. He told the police that he had been arrested twice before and understood his rights. He then proceeded to confess to the crimes under investigation. Noting the "special caution" with which a court must proceed in reviewing a waiver of constitutional rights by a juvenile, the Court rules that the juvenile's motion to suppress should have been granted. Under the "interested adult" rule, "[f]or cases involving a juvenile who has reached the age of fourteen, there should ordinarily be a meaningful consultation with the parent, interested adult, or attorney to ensure that the waiver is knowing and intelligent. For a waiver to be valid without such a consultation the circumstances should demonstrate a high degree of intelligence, experience, knowledge, or sophistication on the part of the juvenile." *Commonwealth v. A Juvenile*, 389 Mass. 128, 134 (1983). In *Alfonso A.*, the Court makes several points about this rule: (1) While it is the "opportunity to consult that is critical, not whether the juvenile avails himself of it," the interested adult must be informed of and understand the juvenile's constitutional rights. (2) Implicit in the rule is the assumption that the interested adult will be present in the interrogation area if not at the interrogation itself. Indeed, G.L. c. 119, § 67 requires the police to notify the parent "immediately" when "a child between seven and seventeen" is arrested. Here, the police never called the defendant's mother, who was at home, to tell her of the interrogation. (3) The "interested adult" should be a parent or other relative or at least "someone who can be considered interested in the defendant's welfare." (4) Evidence of previous arrests alone does not bring a juvenile within the exception to the rule for juveniles who "demonstrate a high degree of intelligence, experience, knowledge, or sophistication."

ADMISSIONS AND CONFESSIONS: MIRANDA, REFUSAL TO SIGN MIRANDA CARD

In *Commonwealth v. Ortiz*, 435 Mass. 569, 577-578 (2002), police officers investigating a homicide advised the defendant of his *Miranda* rights. He told the police that he

understood those rights. When the police then asked if he was willing to speak with them, his response was to deny being involved in any homicide. When asked to sign a *Miranda* form to indicate that he understood his rights, however, he refused and said that he would not sign anything. He subsequently made oral statements confessing to the homicide. The Court upholds the suppression judge's finding that, when the defendant "continued to talk despite the fact that he fully understood that he had a right to remain silent, his words and conduct constituted a waiver." As for the defendant's refusal to sign the *Miranda* form, the Court holds that "[t]he judge correctly concluded that the absence of a written waiver is not dispositive on the issue; [and] that the defendant may, and did, make a valid, oral waiver." *Id.*

ADMISSIONS AND CONFESSIONS: MIRANDA, REQUEST FOR COUNSEL; IDENTITY OF WITNESS AS "FRUIT OF POISONOUS TREE"

A woman on an early morning walk was struck and killed by a vehicle which fled the scene. Several weeks later, an officer stopped the defendant, a Brazilian national who delivered morning newspapers in the area. Various circumstances led the officer to suspect and ultimately arrest the defendant as the driver in the earlier fatal accident. These circumstances included the consistency of the tires and wiper blades on the defendant's car with those on the car involved in the accident, and damage to his car including, in particular, a windshield which, he said, was accidentally broken by a friend on the same day as the accident. Following the defendant's arrest, police interrogation led to his disclosure of the identity of the friend who had damaged and repaired the windshield. This friend ultimately became a prosecution witness at trial and gave testimony damaging to the defendant, who was convicted of leaving the scene. Appellate counsel filed a new trial motion asserting that trial counsel had been ineffective in failing to move to suppress the fruits of the defendant's interrogation. The Appeals Court holds that the motion should have been allowed. *Commonwealth v. Segovia*, 53 Mass. App. Ct. 184 (2001). Fortunately for the defendant, the interrogation was videotaped. The tape revealed that the defendant told his interrogator at the outset that his native language was Portuguese and that he could not understand what the officer was saying. In "marginally understandable" English, he asked to call for a translator, a friend "who was an American and a paralegal." When his friend did not answer his telephone, the defendant asked to wait until he could reach him before giving the officer his side of the story. The officer managed to sidestep this request and, by confronting the defendant with the charges against him, was able to prompt a discussion in which the defendant made incriminating statements and, most importantly, disclosed the name and place of employment of the friend who had allegedly damaged and repaired his car on the same day as the accident. A claim of ineffective assistance based on trial counsel's failure to file a motion to suppress requires a showing that the motion "would have presented a viable claim." *Id.* at 190. The claim here was viable, since "a reasonable police officer would understand [the defendant's request to consult with a friend who was a paralegal] to be a request for legal counsel," and the officer should have stopped all questioning once that request was made. *Id.* at 191. On the second prong of the ineffectiveness claim - whether "there was a reasonable possibility that the verdict would have been different without the excludable evidence" - the Court notes that the identity of the witness who repaired the car was a suppressible fruit of the illegal interrogation, and that the discovery of that witness

without the defendant's statements, although "conceivable", was not "inevitable." *Id.* at 191-192. The Court also found unconvincing a posttrial affidavit in which trial counsel tried to justify his failure to file a suppression motion because the defendant's statements would in any event have been admissible to impeach his anticipated trial testimony. *Id.* at 192-194.

ADMISSIONS AND CONFESSIONS: MIRANDA, STALENESS OF WARNINGS

The defendant was arrested in Stoughton for a crime committed in Boston. Stoughton police officers gave him *Miranda* warnings at the time of arrest and again at the Stoughton police station. Boston police detectives arrived and drove the defendant back to Boston. En route, one of them asked what had happened, and the defendant proceeded to make incriminating statements. Although the Boston detectives did not give the defendant new *Miranda* warnings before asking him what happened, the defendant's motion to suppress his statements was properly denied. *Commonwealth v. Ortiz*, 53 Mass. App. Ct. 168, 171-172 (2001). The time lapse of approximately ninety minutes did not require fresh *Miranda* warnings. "While 'Miranda warnings, once given, are not to be accorded unlimited efficacy or perpetuity . . . there is no requirement that an accused be continually reminded of his rights once he has intelligently waived them.'" *Id.* at 173, quoting *Commonwealth v. Mello*, 420 Mass. 375, 385-386 (1995).

ADMISSIONS AND CONFESSIONS: VOLUNTARINESS, DUTY OF JUDGE TO CONDUCT VOIR DIRE SUA SPONTE

According to *Commonwealth v. Stroyny*, 435 Mass. 635, 646 (2002), a trial judge is obliged to initiate sua sponte a voir dire on the voluntariness of a defendant's confession if (1) there is evidence of a substantial claim of involuntariness, and (2) voluntariness is a live issue at trial. In *Stroyny*, the defendant, whose father had taken him to the hospital, "was greatly distressed. He was crying and screaming in a high pitch, his voice was 'deep and angry,' and he appeared distressed and agitated [H]e was 'crying and moaning, moaning like a real agonal moaning.' The treating physician's assessment indicated 'positive depression.'" Neither this evidence nor evidence that the defendant had ingested marijuana and Valium was sufficient to mandate a voluntariness inquiry. "[D]istress, even profound distress," does not necessarily mean that a defendant is incapable of withholding any information he conveys." *Id.* at 476. For the same reason, the judge was not required to give the jury a "humane practice" instruction. *Id.* at 477.

ADMISSIONS AND CONFESSIONS: VOLUNTARINESS: POLICE ENCOURAGEMENT

In *Commonwealth v. Ortiz*, 435 Mass. 569, 577 (2002), and *Commonwealth v. Brandwein*, 435 Mass. 623, 633-634 (2002), the Supreme Judicial Court upholds confessions prompted by police encouragement of the defendant to tell the truth. In *Ortiz*, the officer told the defendant "it would be to [his] benefit to tell the truth." In *Brandwein*, the officer told the defendant to be "forthright and come forward, speak with these officers and kind of clear a slate for him[self]." Neither form of encouragement was an impermissible offer of leniency or assurance that the confession would help the defendant's defense.

APPELLATE PRACTICE: CHALLENGE TO ILLEGAL EXTENSION OF PROBATION

In *Commonwealth v. Bruzzese*, 53 Mass. App. Ct. 152, 153-154 (2001), further app. rev. granted, 435 Mass. 1107 (2002), discussed at Probation Surrender: Piecemeal Imposition of Concurrent Suspended Sentences, the Appeals Court entertains the defendant's appeal from the denial of his motion to terminate his illegally-extended probation, even though the defendant took no appeal when the judge found a violation and extended his probation at the surrender hearing seven months before.

APPELLATE PRACTICE: CHALLENGE TO PROBATION CONDITIONS

See *Commonwealth v. Lapointe*, 435 Mass. 455 (2001), summarized at Sentencing: Probationary Conditions, concerning the proper way to challenge the legality of probationary conditions.

APPELLATE PRACTICE: DEATH OF DEFENDANT

When a criminal defendant dies while his direct appeal is pending, the normal practice is to vacate the guilty verdicts and dismiss the indictments. *Commonwealth v. Barrows*, 435 Mass. 1011 (2002).

APPELLATE PRACTICE: MOOTNESS, PROBATION VIOLATION

A defendant who appeals a probation revocation is normally entitled to have his appeal decided even though he has completed the resulting jail term. This is so because the revocation decision “might influence future administrative or judicial decisions on bail, sentencing, or parole.” *Commonwealth v. Fallon*, 53 Mass. App. Ct. 473, 474-475 (2001). In *Fallon*, however, the Court takes judicial notice of the defendant’s subsequent conviction on the new charges on which the probation violation was based, and finds that those convictions independently establish the violation beyond a reasonable doubt and render the procedural issues raised in the defendant’s appeal “purely academic.” Under these circumstances, the appeal is dismissed as moot.

APPELLATE PRACTICE: PREJUDICIAL ERROR: EXCLUSION OF DEFENSE EVIDENCE

In *Commonwealth v. Poggi*, 53 Mass. App. Ct. 685, 688 (2002), discussed at Evidence: Demonstrative: Defendant’s Tattoos, the prosecution argued on appeal that the error in denying defense counsel’s request to display his client’s tattoos to the jury was harmless because the jury heard testimony about one of the tattoos. The Appeals Court rejects this argument, saying, “The defendant was entitled to a reasonable opportunity to make his best case.”

APPELLATE PRACTICE: PREJUDICIAL ERROR, SUBSTITUTED REASONS FOR TRIAL JUDGE’S DECISION TO ADMIT EVIDENCE

In *Commonwealth v. Cruz*, 53 Mass. App. Ct. 393 (2001), discussed at Evidence: Hearsay: Prior Consistent Statement, the Appeals Court makes several points helpful to appellate counsel. The prosecution relied on the principle that “if evidence is admissible under any theory supported by the record, it is of no consequence whether the precise reasons assigned by the trial judge are accurate.” The Appeals Court finds this principle to be “[n]either as general [n]or as applicable to this case as [the prosecution] contends.” The Court points out that the trial judge exercised discretion in admitting evidence under a particular theory - discretion which might not have been exercised in the same way under a different theory. *Id.* at 400-401. The Court also points to the fact that “[t]here are different levels and purposes of admissibility with respect to different hearsay exceptions, and the evidentiary consequences may differ considerably depending on the proper theory.” *Id.* at 401. The judge’s error in admitting the evidence under the penal interest exception also “denied the defense the right and opportunity to request [the] proper limiting instruction” which would have applied if the evidence had been admitted

under the prior consistent statement exception. *Id.* at 402. On the issue of prejudice, the Court notes that hearsay testimony which merely reiterates the declarant's in-court testimony may nonetheless be prejudicial error. *Id.* at 404-405.

APPELLATE PRACTICE: PRESERVATION OF ISSUE

In *Commonwealth v. Buzzell*, 53 Mass. App. Ct. 362, 365-366, 369-370 (2000), summarized at Prosecutorial Misconduct: Closing Argument Implicating Defendant's Failure to Testify, defense counsel adequately preserved his objections to the prosecutor's closing argument, although he did not voice those objections until after the judge's charge. The judge had denied counsel's request to be heard ("presumably to voice those objections") at the end of the prosecutor's closing, and counsel's first available opportunity to state his objections was after the charge.

APPELLATE PRACTICE: PRESERVATION OF ISSUE

In *Commonwealth v. Carnell*, 53 Mass. App. Ct. 356, 359-360 (2001), summarized at Crimes: Operating under the Influence: Breathalyzer Refusal, the Appeals Court holds that the defendant's objection was adequately preserved, even though it was raised at "inaudible" side bar conferences which were not reconstructed for the appeal. See Mass. R. App. P. 8(e). The court was able to reasonably infer what occurred at sidebar, and subsequent events showed that the judge was clearly alerted to the issue.

APPELLATE PRACTICE: REVIEW UNDER G.L. c. 211, § 3

Review by a single justice under G.L. c. 211, § 3, will be exercised only in "the most exceptional circumstances" and is only available to a party who has no other legal remedy available. The defendant in *Constantine v. Commonwealth*, 435 Mass. 1011 (2002), had several other available means to challenge alleged improprieties in the issuance of a 209A order, his criminal convictions for violating that order, and his probation surrender based on those convictions. In particular, he could have appealed the issuance of the original 209A order or the probation surrender, and he could have moved for a new trial under Mass. R. Crim. P. 30(b). The defendant in *Votta v. Commonwealth*, 435 Mass. 1013 (2002), could have filed a motion for a new trial to pursue his claim of new evidence that would undermine the integrity of his littering conviction: He could file a motion for a new trial. His fear that such a motion would be unsuccessful did not establish the absence of any adequate remedy other than G.L. c. 211, § 3. The defendant in *Farley v. Commonwealth*, 435 Mass. 1010 (2001), sought an interlocutory appellate ruling that, if she had certain forensic testing done and the results were unfavorable to her cause, the Commonwealth could not use those results against her at trial; she also sought interlocutory reversal of a superior court judge's ruling on a pretrial motion in limine on the admissibility of certain prosecution evidence. With respect to both matters, the Court held that the defendant had not satisfied S.J.C. Rule 2:21(2), which requires a c. 211, § 3 petition to "set forth . . . reasons why review of the trial court decision cannot adequately be obtained by appeal . . . or by other available means." Review is not inadequate simply because it occurs after the defendant's conviction and incarceration. Nor was the Court willing to assume that the trial judge would necessarily reject either of the defendant's positions in the end. (Indeed, the defendant's concern in the forensic issue seems to be

solidly protected by the Court's decision in *Commonwealth v. Haggerty*, 400 Mass. 437, 441 [1987].)

APPELLATE PRACTICE: STANDARD OF REVIEW: DUE PROCESS VIOLATION IN PROBATION SURRENDER PROCEEDINGS

In *Commonwealth v. MacDonald*, 53 Mass. App. Ct. 156, 157-159 (2001), discussed at Probation Surrender: Due Process Requirements: Findings by Judge, Defendant's Prior Record, the Appeals Court assumes, favorably to the defendant, that the "harmless beyond a reasonable doubt" standard applies in reviewing a due process violation in probation surrender proceedings.

COUNSEL: INEFFECTIVE ASSISTANCE: FAILURE TO FILE SUPPRESSION MOTION, "MANIFESTLY UNREASONABLE"

For a case in which the Appeals Court finds trial counsel's failure to file a motion to suppress the defendant's statement "manifestly unreasonable," in spite of counsel's affidavit defending his rationale for failing to file the motion, see *Commonwealth v. Segovia*, 53 Mass. App. Ct. 184, 192-194 (2001), discussed at Admissions and Confessions: Miranda, Request for Counsel; Identity of Witness as "Fruit of Poisonous Tree."

COUNSEL: INEFFECTIVE ASSISTANCE: FAILURE TO IMPEACH WITNESS

See *Commonwealth v. Ortiz*, 53 Mass. App. Ct. 168, 179-181 (2001), discussed at Evidence: Impeachment, Delinquency Adjudication, Pending Charges.

COUNSEL, INEFFECTIVE ASSISTANCE: FAILURE TO OBTAIN EXPERT PSYCHIATRIC TESTIMONY

Counsel for a defendant charged with first-degree murder sought a psychiatric expert to support a claim of insanity or diminished capacity. The first expert who examined the defendant labeled him "a malingerer and a liar." The second, after spending fourteen hours with the defendant, concluded that there was insufficient evidence to support a conclusion of diminished capacity or lack of criminal responsibility. Counsel was not ineffective when he threw in the towel at that point and did not seek yet another expert's opinion. *Commonwealth v. Fletcher*, 435 Mass. 558, 564 (2002). Nor was counsel ineffective when, after consulting with the defendant, he did not present the testimony of either of these experts at trial and chose instead to present a defense of insanity and diminished capacity through cross-examination of prosecution witnesses to show the defendant's cocaine addiction, his personal travails, and the irrationality of many of his actions in connection with the killing. *Id.* at 564-565. Counsel's decision (again after consultation with the defendant) not to elicit evidence that the defendant, in addition to confessing to the murder on trial, had also "falsely" confessed to twelve other murders was a reasonable tactical decision. While DNA evidence excluded the defendant as the perpetrator of one of those murders, all twelve were still under investigation at the time of trial and the details of the murders, as described to the police by the defendant, paralleled in many respects the details of the murder on trial. *Id.* at 565-566.

CRIMES: BREAKING AND ENTERING: INTENT TO COMMIT A FELONY

A young defendant broke into the home of his estranged mother and stepfather, who were out of town at the time. He forced open a gun cabinet and removed several weapons. He summoned by telephone a friend who had dropped him off at a package store an hour before. When the friend arrived, the defendant said that he wanted to kill himself and placed the barrel of a gun in his mouth. He did not fire the gun, however. Instead, he told his friend that “it was against his religion to kill himself, so he would have the police kill him.” The friend fled. The defendant fired gunshots into the ceiling periodically until a police cruiser arrived. In the twelve-hour standoff that ensued, the defendant shot at the police and demanded that they issue a public apology for previously having falsely charged him with assault and battery on a police officer. Ultimately, the police used tear gas to force the defendant from the home. In a jury-waived trial he was convicted of breaking and entering with intent to commit a felony, among other offenses.

Commonwealth v. Lauzier, 53 Mass. App. Ct. 626 (2002). On appeal, he argued that the evidence was insufficient to establish that he harbored the requisite intent to commit a felony when he broke into the home, rather than acquiring that intent after he was inside. The Court holds that there was sufficient evidence to warrant a finding that he had the specific intent to commit both assault by means of a dangerous weapon on the police officers and wilful and malicious destruction of property worth more than \$250. The defendant argued that, at the time of the break, his intent was to commit a suicide, rather than the felonies alleged. The Court finds no incompatibility between these intents and says that an inference that he intended to kill himself by engaging the police in a firefight was “reasonable and possible” in light of the facts that he bore a grudge against the police, “his religious convictions were antithetical to suicide,” and he had no need for such a large arsenal of guns to simply kill himself. The Court’s rationale as to the timing of the defendant’s intent to commit wilful and malicious destruction of property is not expressly stated in the opinion but seems to be inferred from “the defendant’s expressed [during the standoff with the police] anger and hostility at being left without a home.”

PRACTICE TIP: The logic of the *Lauzier* opinion is hardly compelling. So far as the opinion reveals, the first mention of suicide by the defendant occurs in conversation with his friend - perhaps as long as an hour after he broke into the home. It appears that counsel may have conceded too much if indeed he suggested that the homeless defendant had the suicidal intent at the time of the break. Such intent could as easily have arisen after the break - a possibility which would explain why the defendant had, so far the record reveals, done nothing to further a suicide plan right after the break. The opinion itself is troubling in that it proceeds on the assumption of forethought and planning by a suicidal young man. The felonious intent here is quite different from the intent to steal which may be routinely inferred when a defendant breaks into a stranger’s home. See *Commonwealth v. Maia*, 429 Mass. 585, 587-588 (1999). The *Lauzier* opinion illustrates the tension between two appellate approaches to required finding issues: The approach which it seems to embody demands only that an inference necessary to a finding of guilt be “reasonable and possible,” and not “necessary and inescapable.” “If conflicting inferences are possible from the evidence, it is for the jury to determine where the truth lies.” *Commonwealth v. Pike*, 430 Mass. 317, 321 (1999). The other approach looks at “competing inferences bearing on the question of intent,” and, if they are “of equal force or probability,” concludes that “the choice between them may amount to impermissible

conjecture, an insufficient basis for a finding of guilt beyond a reasonable doubt.” *Commonwealth v. Lombard*, 419 Mass. 585, 589 (1995).

**CRIMES: BREAKING AND ENTERING: INTENT TO COMMIT A FELONY,
JURY INSTRUCTION ON ELEMENTS OF INTENDED FELONY**

The defendant was accused of breaking and entering a dwelling in the nighttime with intent to commit a felony. The occupant of the dwelling awoke to the sound of a window screen crashing onto his living room floor. This noise was followed by the sound of the building’s security alarm. The intruder apparently fled following this commotion. Charged with breaking and entering, the defendant was convicted by a jury of *attempted* breaking and entering. [An attempt to commit a crime is a lesser included offense of an indictment charging the crime attempted; a defendant may be convicted of an attempt on an indictment charging the attempted crime if, and only if, the indictment alleges a particular overt act done toward the accomplishment of the crime attempted. See *Commonwealth v. Gosselin*, 365 Mass. 116, 120-122 (1974).] On appeal, the defendant argued that the evidence was insufficient to warrant a finding of intent to commit the allegedly intended felony, larceny in a building, and that the trial judge’s failure to instruct the jury on the elements of that offense gave rise to a substantial risk of a miscarriage of justice. The Court rejected both arguments. *Commonwealth v. Willard*, 53 Mass. App. Ct. 650 (2002). With respect to the required finding issue, the Court found that a jury could reasonably conclude that the sleeping occupants of the building “were relying on the locked doors and windows of the building, along with the alarm system to safeguard their possessions,” and that “[c]onsequently, their property was under the protection of the building rather than under their personal watch and care.” *Id.* at 655. With respect to the matter of jury instructions, the Court asserts that “the identity of the felony is not an element of the crime and the jury can find an intent to commit an unspecified felony.” The specification of a particular felony in the judge’s instructions is “mere surplusage.” *Id.* at 653. Here, the judge told the jury that the prosecution must prove “that the defendant acted with the specific intent to commit a larceny in a building,” and that that crime is a felony. This was, according to the Court, more than was required. In a footnote, the Court remarks that it does “not seek to discourage” the use of instructions on the elements of the intended offense,; but that, when a trial judge does attempt to instruct the jury on those elements, she must do so accurately. *Id.* at 657 n. 9. The Court is on sounder ground when it concludes that the crime of trespass is not a lesser included offense of breaking and entering, since trespass, unlike breaking and entering, includes the element of entering or remaining on the premises after having been forbidden to do so. *Id.* at 658-659.

PRACTICE TIP: The Court’s conclusion that a jury need not be instructed on the elements of the intended felony cannot be correct - unless the alleged felony is one whose elements would be a matter of common knowledge (such as, for example, a homicide). Trial counsel should always insist that the judge specify to the jury the allegedly intended felony and its essential elements. The jurors cannot be expected to know what constitutes a particular crime or whether that crime is, in fact, a felony rather than a misdemeanor. See *Commonwealth v. Walter*, 40 Mass. App. Ct. 907, 909 (1996) (“Because the jury was not informed of the meaning of felony, ‘[t]he defendant’s fate

thus turned on a layman's definition of [felony]. [This is a] technical matter[] with which laymen cannot be expected to be familiar."); *Commonwealth v. White*, 353 Mass. 409, 425 (1967), cert. denied, 391 U.S. 968 (1968) (finding error in judge's failure to explain elements of robbery and breaking and entering where the jury's decision whether to convict the defendant of first or second degree felony murder turned on the distinction between those two crimes). But see *Commonwealth v. Stack*, 49 Mass. App. Ct. 227, 235-236 (2000) (judge possibly required to instruct jurors on the elements of the target crime in a conspiracy case if that crime is not one likely to be within the jurors' common knowledge, but armed robbery is not such a crime).

CRIMES: COMMON AND NOTORIOUS THIEF

See *Commonwealth v. Clark*, 53 Mass. App. Ct. 342 (2001), summarized at Sentencing: Date of Offense for Truth in Sentencing Purposes, Amendment to Mittimus.

CRIMES: CONSPIRACY

In the context of a scheme by two business owners and a Star Market employee to defraud Star Market by double-billing for purchases of refrigeration equipment, the Appeals Court reminds us that "a conspiracy rarely wears its heart on its sleeve," and that the necessary agreement may be tacit and its existence "may be inferred from a course of conduct having a common design." *Commonwealth v. Melanson*, 53 Mass. App. Ct. 576, 580 (2002). The Court also notes that the out-of-court statements of a co-conspirator are frequently and properly admitted under the hearsay exception for such statements "de bene," subject to a motion to strike if the prosecution ultimately fails to present evidence of the conspiracy independent of the statement. *Id.* at 581. Also, with respect to the foundation requirement that the statement be made "during the course of and in furtherance of the conspiracy," it is the actual duration of the conspiracy, not the time period alleged in the indictment, which is determinative. *Id.* at 582. Here, the conspiracy was an ongoing one, apparently pre-dating by many years the illustrative fraudulent transactions on which the indictment was based. Moreover, according to the Court, "[m]atters surrounding the history of the conspiracy, including statements of coconspirators, may be admissible even if they predate the conspiracy." *Id.* at 582, quoting *Commonwealth v. McLaughlin*, 431 Mass. 241, 248 (2000).

CRIMES: DOMESTIC ABUSE, "STAY AWAY" ORDER

The defendant was subject to a district court abuse prevention order obliging him "not to contact" and to "stay at least 100 yards from" Bridie O'Loughlin. At a concert on the Wrentham town common, O'Loughlin saw the defendant standing three or four feet away from her. He was alone and remained there "looking about the area" for ten to fifteen minutes. Charged with having violated the protective order, the defendant moved to dismiss the complaint. A district court judge allowed the motion. *Commonwealth v. Finase*, 435 Mass. 310 (2001). The judge based his dismissal order on *Commonwealth v. Gordon*, 407 Mass. 340 (1990), where the Supreme Judicial Court, interpreting the language of the statute, had limited criminal prosecutions under G.L. c. 209A, § 7, to instances of "abusing the plaintiff" or failing to "vacate the household." Unfortunately for the defendant here, the wording of the statute interpreted in *Gordon* has since been amended. It now provides for criminal prosecution of orders "to vacate, refrain from

abusing the plaintiff *or to have no contact with* the plaintiff or the plaintiff's minor child." The defendant was left to argue that the "no contact" language in the amended statute does not encompass an order to stay a certain distance away. The Supreme Judicial Court rejects this argument and, in the process, explains the difference between a "no contact" and a "stay away" order: "[A] 'no contact' order includes a 'stay away' order. Pursuant to a 'stay away' order, the defendant may not come within a specified distance of the protected party, usually stated in the order, but written or oral contact between the parties is not prohibited. By contrast, a 'no contact' order mandates that the defendant not communicate by any means with the protected party, in addition to remaining physically separated. Thus, a 'no contact' order is broader than a 'stay away' order." *Id.* at 314. In response to the defendant's concern that the criminal prosecution of "stay away" violations may lead to punishment for accidental or unintentional violations, the Court states that, under long-standing common-law principles, a defendant may not (in the absence of a contrary indication by the Legislature) be punished for accidental, mistaken, or unknowing violations of the distance requirements of an abuse prevention order. *Id.* at 315. (For a discussion of the difference between a "stay away" and a "no contact" order in the context of probation violation proceedings, see *Commonwealth v. MacDonald*, 435 Mass. 1005 (2001), discussed at Probation Surrender: Discrepancy between Docket Entries and Signed Conditions of Probation.)

CRIMES: DOMESTIC ABUSE, WARRANTLESS ARREST

See *Richardson v. City of Boston*, 53 Mass. App. Ct. 201 (2001), discussed at Search and Seizure: Arrest without Warrant for Domestic Abuse.

CRIMES: DRUGS: CAUSING, INDUCING, OR ABETTING A MINOR TO DISTRIBUTE

In *Commonwealth v. Serrano-Ortiz*, 53 Mass. App. Ct. 608, 610-613 (2002), the Appeals Court rejects a defendant's claim that, in a prosecution under G.L. c. 94C, § 32K (establishing a five-year minimum mandatory sentence for "[a]ny person who knowingly causes, induces or abets a person under the age of eighteen to distribute, dispense or possess with the intent to distribute or dispense any controlled substance"), the evidence must establish that the minor and the defendant "share[d] the same intent or ha[d] an agreement to distribute a controlled substance." To so hold, the Court points out, would unreasonably exclude from the statute a drug dealer who gives a child a sealed package of drugs to deliver, unless the child knew that the package contained drugs. The primary focus in *Serrano-Ortiz* is upon the "cause" or "induce" alternatives in the statute. Even in the case of "abetting," however, the Court notes that it need not be proved that the minor knew that what he was distributing was drugs, as long as there is agreement (express or implied) between him and the defendant that the defendant stands ready to assist him. *Id.* at 612, discussing *Commonwealth v. Kirkpatrick*, 4 Mass. App. Ct. 355, 357 (1998).

CRIMES: DRUGS: DISTRIBUTION: ENTRAPMENT, OUTRAGEOUS POLICE CONDUCT

Two visits in five days to the defendant's home by a female undercover state trooper led to purchases of small amounts of cocaine from persons other than the defendant. When

the trooper made a third visit a week later, the defendant, who was “obviously high” on cocaine, took her to a house where he procured some cocaine for her. A week later, the trooper searched out the defendant who was out on the town with his girlfriend. While the girlfriend was in the restroom of “The Pub,” the trooper approached the defendant, who was drunk. As the trooper was “practically begging” the defendant for some cocaine, the girlfriend returned. She saw the trooper “draped on her inebriated boyfriend” and “left in a huff.” The defendant agreed to go with the trooper to find some crack for her. After driving to Bourne and then to Plymouth, they eventually found a seller. The defendant purchased the crack, contributing some of the money for the purchase himself, and immediately smoked a piece. When he asked the trooper for more, she refused. The defendant was convicted of two counts of distributing cocaine. He subsequently filed a motion for a new trial, claiming that his trial counsel was ineffective in relying on a defense of improper venue, rather than entrapment or outrageous police conduct. The trial judge denied the motion without holding a hearing or making findings. A majority of the three-judge Appeals Court panel holds that the motion raised “an issue of sufficient importance to warrant findings and perhaps an evidentiary hearing.” *Commonwealth v. Harding*, 53 Mass. App. Ct. 378, 382 (2001). The majority reviews the law of entrapment, observing that the defense is raised by some evidence of inducement (beyond a mere request) by a government agent or one acting at his direction. Once the defense is raised, the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was “predisposed” to commit the crime. *Id.* at 379. The third justice of the panel, while concurring in the result, finds tactical reasons for avoiding an entrapment defense: Raising the defense would have permitted the prosecution to introduce, as evidence of “predisposition,” the defendant’s three prior drug-dealing convictions, as well as his possession of several shotguns, rifles, and seven pounds of ammunition. *Id.* at 384. The majority, however, opines that evidence of the weaponry would not have been admissible because it was not shown to be unlawfully possessed. *Id.* at 381-382 n.1. The majority also asserts, 382 n. 3, that “predisposition” means more than mere “willingness to commit the crime,” citing the multi-factor test set out in *United States v. Thickstun*, 110 F. 3d 1394, 1396 (9th Cir.), cert. denied, 522 U.S. 917 (1997): “(1) the defendant’s character and reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the activity for profit; (4) whether the defendant showed any reluctance; and (5) the nature of the government’s inducement.” While the concurring judge has no difficulty with trial counsel’s tactical choice to shun an entrapment defense, he concludes that remand and an evidentiary hearing are required to evaluate counsel’s rejection of a defense that “the conduct of the police toward [the defendant] was so outrageous and offensive to fair play as to constitute a violation of due process.” 53 Mass. App. Ct. at 385-387. The foundation for such a defense would have been the trooper’s zeal in pursuing the defendant not only at home, but even when he was out socially and intoxicated, and that she preyed on his addiction to cocaine. The concurring judge seems to assume that this defense would not open the door to “predisposition” evidence.

PRACTICE TIP: An alternative defense in the not-uncommon scenario in which a defendant assists in a drug purchase with an eye toward obtaining part of the drugs for himself is the joint purchase defense. See *United States v. Swiderski*, 548 F.2d 445 (2d

Cir. 1977) (no “transfer” of drugs may occur between two individuals in joint possession of a controlled substance simultaneously acquired for their own use); *Commonwealth v. Johnson*, 413 Mass. 598, 605 (1992); but see *Commonwealth v. Minor*, 47 Mass. App. Ct. 928 (1999); *Commonwealth v. Mitchell*, 47 Mass. App. Ct. 178, 181-182 (1999); *Commonwealth v. Fernandes*, 46 Mass. App. Ct. 455, 461-463 (1999); *Commonwealth v. DePalma*, 41 Mass. App. Ct. 798, 802-804 (1996). While the prerequisites of this defense are demanding, the defense has the advantage of allowing the jurors (who are unlikely to view the drug-addicted defendant as fitting their mental image of a drug dealer) to convict the defendant of the crime of which he is really guilty - simple drug possession - rather than acquitting him altogether.

CRIMES: DRUGS: FORFEITURE PROCEEDINGS, ADEQUACY OF NOTICE

In *Dusenbery v. United States*, 122 S.Ct. 694 (2002), the Supreme Court upholds the procedures used by the FBI to notify a federal prisoner of his right to contest the forfeiture of property seized in a drug raid of his home. The Due Process test for such notice is whether the notice given is “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* at 700, quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). That test was satisfied by sending the written notice by certified mail addressed to the defendant at the federal prison, where the mailroom officer signed the certified receipt for the letter, logged it in, and gave it to the defendant’s “Unit Team” to give to him. The defendant’s claim that he had not actually received the notice was unavailing. If notice complying with the *Mullane* standard is given, lack of actual notice is irrelevant. “The title to property should not depend on such vagaries” as disputed testimony as to whether or not the letter was in fact delivered to the defendant. 122 S.Ct. at 701.

CRIMES: DRUGS: POSSESSION

Documents bearing the defendant’s name (“Manuel Feliz Alcantara”) were found in a dresser drawer in the master bedroom of a Lawrence apartment which was the subject of a police search. A prescription bottle containing 7.18 grams of crack cocaine and bearing the name “Manuel Feliz” was found on a bathroom shelf. An additional 28.66 grams of crack were found under the “kick plate” of the bathroom sink. This evidence was sufficient to support the defendant’s conviction for possession of cocaine with intent to distribute it. *Commonwealth v. Alcantara*, 53 Mass. App. Ct. 591, 596-597 (2002). The items bearing the defendant’s name in the bedroom and the bathroom were sufficient to justify an inference of his dominion and control of the bathroom. The possession of the smaller amount of crack cocaine in the pill bottle was, according to the Court, sufficient to link him to the larger amount of crack found under the “kick plate.”

CRIMES: LARCENY: FROM A PERSON, IN A BUILDING

For a case distinguishing the elements of larceny from a person from those of larceny in a building and simple larceny, see *Commonwealth v. Willard*, 53 Mass. App. Ct. 650, 654-655 (2002), discussed at Crimes: Breaking and Entering: Intent to Commit a Felony, Jury Instruction on Elements of Intended Felony.

CRIMES: MALICIOUS DESTRUCTION OF PROPERTY, OVER \$250 ELEMENT

In *Commonwealth v. Lauzier*, 53 Mass. App. Ct. 626 (2002), discussed at Crimes: Breaking and Entering: Intent to Commit a Felony, appellate counsel argued that the “over \$250” element of a malicious destruction charge should be based on the value of the gun cabinet which was damaged, rather than the whole house of which the cabinet was a part. The Court found it unnecessary to decide this question because trial counsel conceded the legal issue in his required finding and closing arguments, and “the case was prosecuted and defended on a theory of valuation based on the dwelling as a whole.” *Id.* at 632-634. Perhaps more importantly, although relegated to a footnote, there was no substantial risk of a miscarriage of justice because the damage to the home extended well beyond the gun cabinet. *Id.* at 633 n. 10. The Court does suggest, however, that, “had the damage been limited to a freestanding and segregable part of the dwelling, . . . a more limited valuation might have been in order, requiring proof of valuation of just that part of the dwelling.”

CRIMES: MANSLAUGHTER: JURY INSTRUCTIONS

Commonwealth v. Lapage, 435 Mass. 480 (2001), and *Commonwealth v. Ware*, 53 Mass. App. Ct. 227 (2001), further app. rev. granted, 435 Mass. 1109 (2002), are the latest in a long line of recent cases in which judges have muddled jury instructions on the elements of voluntary manslaughter by telling juries that the prosecution must prove that the killing was committed upon reasonable provocation or in the heat of passion. In both cases, there was no dispute that the defendant had killed the so-called “victim.” In *Lapage*, the defendant, who was accused of first degree murder, asked the jury to find him guilty of only voluntary manslaughter due to reasonable provocation or excessive force in self-defense. The Supreme Judicial Court found a substantial risk of a miscarriage of justice in the trial judge’s instruction that, “to prove the defendant guilty of voluntary manslaughter, the Commonwealth must prove . . . beyond a reasonable doubt . . . that the defendant injured [the victim] as a result of sudden combat or heat of passion.” This instruction “incorrectly told the jury that malice is negated by provocation only if provocation is proved beyond a reasonable doubt. The correct rule is that, where the evidence raises the possibility that the defendant may have acted on reasonable provocation, the Commonwealth must prove, and the jury must find, beyond a reasonable doubt that the defendant did not act on reasonable provocation.” *Id.* at 484, quoting *Commonwealth v. Acevedo*, 427 Mass. 714, 716 (1998). The judge’s subsequent correct instruction on the subject did not cure this error because it was not made clear to the jurors that it carried more weight than the incorrect instruction. In fact, the judge told the jury that “all of these instructions have equal weight.” *Id.* at 484-485.

In *Ware*, unlike most others in this line of cases, the defendant was accused only of voluntary manslaughter, instead of murder with manslaughter as a possible lesser included offense for the jury to consider. The judge defined manslaughter as an “unlawful, intentional killing, resulting from a sudden transport of the passions . . . produced by adequate and reasonable provocation . . . or upon sudden combat,” and told the jurors that the prosecution must prove beyond a reasonable doubt that the defendant killed the victim without legal excuse or justification and “that [he did so] in the heat of

passion.” The judge went on to say that, if these elements were proved, they “must find” the defendant guilty of manslaughter. He repeated these instructions in response to a jury request for “the legal definition of manslaughter.” It was “plain error” for the judge to tell the jurors that the prosecution must prove “heat of passion.” *Id.* at 241-242. The prosecution argued that this error merely placed on it the burden of proving an additional element and did not prejudice the defendant. The Appeals Court reversed the conviction, however, because it could not be sure that the jury did not “underst[and] the judge’s instructions as requiring a conviction if they found that the defendant had acted in the heat of passion *even* if they also found that he had used reasonable force in self-defense.” *Id.* at 242 [emphasis in original]. Although the judge’s instructions required the prosecution to prove the absence of legal excuse or justification and explained the concept of self-defense, the judge never told the jurors that self-defense would constitute a legal excuse or justification for a killing committed in the heat of passion.

CRIMES: OPERATING UNDER THE INFLUENCE: BREATHALYZER REFUSAL

During the trial of an operating under the influence charge, defense counsel asked the arresting officer if the defendant had requested a blood test. The officer could not recall, but on redirect the prosecutor showed him a “Massachusetts State Police Statutory Rights and Consent Form” to refresh his recollection. The officer then testified that the defendant had checked off the “No” box on the form, thus indicating that he did not wish to take a blood test. Defense counsel objected and the judge held a voir dire hearing at which it became clear that the “No” answer referred to the defendant’s refusal of a breathalyzer, rather than a blood test. A defense motion for a mistrial was denied, and the trial proceeded to conclusion without any corrective action by the judge. During deliberations, the jury asked questions about the absence of evidence of breathalyzer results and the defendant’s negative response to the blood test offer. The judge told the jurors that these questions concerned information not in evidence and that they should not speculate about such matters. Notwithstanding this instruction, the Appeals Court reversed the defendant’s conviction. *Commonwealth v. Carnell*, 53 Mass. App. Ct. 356 (2001). The officer’s testimony about the supposed blood test refusal was factually wrong, and defense counsel could not have corrected it through cross-examination without the jury learning that the defendant had refused the breathalyzer test - information which would have violated his privilege against self-incrimination under the state constitution, *Commonwealth v. Zevitas.*, 418 Mass. 677, 682-683 (1994), and G.L. c. 90, § 24(1)(e). The judge’s response to the jury questions “came too late and did not cure the error,” since it referred only to the consent form itself and not the officer’s erroneous testimony about the defendant’s supposed refusal to take a blood test.

CRIMES: OPERATING UNDER THE INFLUENCE: INSTRUCTION ON ABSENCE OF BREATHALYZER EVIDENCE

Because jurors in previous operating under the influence trials had made it clear to him through questions during deliberations or during post-verdict discussions that they had engaged in improper speculation about the absence of breathalyzer evidence, a trial judge instructed the jurors in the defendant’s case that they were to “put . . . completely out of [their] mind” and “not to mention or consider in any way whatsoever, either for or

against either side, that there is no evidence of a breathalyzer.” *Commonwealth v. Downs*, 53 Mass. App. Ct. 195 (2001). The Appeals Court upholds this instruction, distinguishing it from the instruction condemned in *Commonwealth v. Zevitas*, 418 Mass. 677 (1994). The latter instruction, by informing the jury of the possible reasons for the absence of breathalyzer evidence, invited speculation that the absence was due to the defendant’s refusal. Here, in contrast, the jurors were not told of the defendant’s right to refuse the test. Instead, they were “simply but forcefully instructed” not to consider the absence of test results at all. According to the Court, “without some form of a limiting instruction concerning the breathalyzer, a jury very well could rely upon their common knowledge [of breathalyzer testing] and engage in the same speculation” which was improperly invited by the instruction condemned in *Zevitas*. 53 Mass. App. Ct. at 199.

CRIMES: POSING A MINOR IN A STATE OF NUDITY, “LASCIVIOUS INTENT”

Posing a minor in a state of nudity is only a violation of G.L. c. 272, § 29A(a), if it is done with “lascivious intent.” In *Commonwealth v. Bean*, 435 Mass. 708 (2002), the Supreme Judicial Court explores the meaning of this term in the context of an amateur photographer who took pictures of a fifteen-year-old girl, with one breast uncovered, casually embracing her boyfriend. The term is defined by G.L. c. 272, § 31, as “a state of mind in which the sexual gratification or arousal of any person is an objective.” The statute goes on to provide that “proof of lascivious intent may include, but shall not be limited to” six listed factors, such as “whether the child is depicted in an unnatural pose or in inappropriate attire, considering the child’s age” and “whether the depiction denotes sexual suggestiveness or a willingness to engage in sexual activity.” These factors (which closely track factors used in the federal courts to determine whether an exhibition of the genitals is “lascivious” under the Federal Child Protection Act of 1984 [18 U.S.C. § 2252]) are, according to the Court, “merely examples of evidence that ‘may’ be relevant,” and “proof of their existence in any particular case is neither required . . . nor necessarily sufficient” to support a finding of lascivious intent. 435 Mass. at 713. The Court in *Bean* undertakes a review of the photographs to decide whether they are themselves lascivious or otherwise provide sufficient evidence of lascivious intent. The Court conducts this review de novo, rather than in the light most favorable to the Commonwealth, because of the First Amendment values involved. *Id.* at 714 & n.15. It concludes that the photographs are neither obscene nor pornographic, that they were intended to have an artistic quality, and that, examined in light of the six factors enumerated in the statute, they are neither lascivious nor sufficient evidence of lascivious intent. *Id.* at 715-716. The Court makes it clear that a conviction may not be “based solely on the age and nudity of the subject.” *Id.* n. 17. Also, the defendant’s “awareness that the photographs might be legally problematic . . . add[ed] little weight to the evidence that he acted with lascivious intent.” *Id.* at 716.

CRIMES: RECEIVING STOLEN PROPERTY

Police officers stopped the defendant at 4:20 a.m. on a street in Dorchester, sweating profusely and with fresh cuts on his hand. He was carrying a case containing twenty CD’s. A search of his person turned up a screwdriver in one pocket and a radar detector in the other, as well as a car radio stuffed inside his pants. The radio had gouge marks

suggesting it had been pried from its holder - perhaps by the screwdriver. The defendant volunteered to the police, "You got me, just take me in." A check of cars in the area revealed none that had been broken into, and the true owner of the property found on the defendant was never discovered. The defendant was nonetheless tried and convicted on a charge of receiving stolen property. *Commonwealth v. Cromwell*, 53 Mass. App. Ct. 662 (2002). On appeal, the Court rejects the defendant's argument that the prosecution must establish the identity of the rightful owner of allegedly stolen goods. Proof that the goods belong to *someone other than the defendant* is sufficient. *Id.* at 663-667. Here, the circumstantial evidence was sufficient to establish that the property was stolen and that the defendant knew it to be such. *Id.* at 667-669.

CRIMES: SPECIFIC INTENT: ASSAULT WITH INTENT TO MURDER, MAYHEM

In *Commonwealth v. Diaz*, 53 Mass. App. Ct. 209, 213-214 (2001), discussed at Double Jeopardy: Duplicative Convictions, the Appeals Court rejects the defendant's argument that guilty verdicts for mayhem (requiring intent to maim or disfigure) and armed assault with intent to murder cannot both stand because the two crimes demand inconsistent intents. According to the Court, "Experience shows that the human mind is capable of simultaneously harboring inconsistent intent, and case law is in accord with this understanding."

PRACTICE TIP: A different result is probably required when a defendant is charged with both armed assault with intent to murder and armed assault with intent to rob. Both of those offenses arise under the same criminal statute, G.L. c. 265, § 18(b) ("[w]hoever, being armed with a dangerous weapon, assaults another with the intent to rob or murder shall be punished"). The legislature's choice of words and the placement of the offenses in a single statute seem designed to establish a single punishment for a single offense which may be proven by evidence of either of two specific intents. A defendant should not be convicted of two offenses for a single assault motivated by both intents, any more than a defendant should

be convicted of two counts of mayhem if he intends to both maim and disfigure his victim or two counts of first degree murder if the killing is both deliberately premeditated and accomplished with extreme atrocity or cruelty.

CRIMES: SUBSEQUENT OFFENDER: REPRESENTED BY COUNSEL IN PREDICATE CONVICTION PROCEEDINGS

See Practice Note and discussion of *Commonwealth v. Saunders*, 435 Mass. 691 (2002), at Evidence: Impeachment: Prior Conviction, Represented by Counsel.

DEFENSES: CRIMINAL RESPONSIBILITY

Although expert testimony is not a prerequisite to an instruction on criminal responsibility, there must be some evidence which, if believed, might create a reasonable doubt concerning that issue. Suicidal ideation alone does not justify an insanity instruction, nor does testimony by the defendant that he “just went crazy.” Thus, where the experts who testified at the defendant’s murder trial did not suggest that he lacked criminal responsibility, where he had no history of mental illness, and where his acts did not on their face appear irrational, the defendant was not entitled to the instruction. *Commonwealth v. Sleeper*, 435 Mass. 581, 601 (2002).

DEFENSES: NECESSITY

Accused of punching his girlfriend in the mouth and bloodying her lip in the process, the defendant testified at trial that he had slapped her to try to revive her from an apparent drug overdose. His task of convincing the jury was made more difficult by a broken window in the girlfriend’s bedroom, by his own unsuccessful attempt to hide when the police arrived, and in particular by a letter he wrote to the girlfriend. In that letter, he begged her to “help [him] out of this;” told her what his “story [at trial] will be,” and asked her to tell the same story. The letter concluded with the hopeful words, “This just may work.” On appeal after his inevitable conviction, the defendant argued that a substantial risk of a miscarriage of justice was created when the judge failed to instruct the jury on the defense of necessity. *Commonwealth v. O’Kane*, 53 Mass. App. Ct. 466 (2001). The court held that, even in the light most favorable to the defendant, the evidence did not satisfy the prerequisites for a “necessity” instruction: (1) that the defendant or another “is faced with a clear and imminent danger, not one which is debatable or speculative; (2) that the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger; and (3) that there is no legal alternative which will be effective in abating the danger.” *Id.* at 470. The “danger” probably must be “present in an objective sense.” However, even if a subjectively perceived danger would do, the subjective viewpoint must be that of a “reasonable person.” Leaving aside questions as to the “danger” element, the court could not accept that a slap in the face could reasonably be seen as “effective” in abating a drug overdose or that the “legal alternative” of a 911 call would not have been at least as effective. *Id.* at 471.

PRACTICE TIP: The court wisely points out that trial counsel’s approach of questioning the defendant’s criminal intent under the standard jury instruction held out more hope than a “necessity” instruction: “Under [a] necessity instruction, the defendant would have

to conjure with notoriously exacting requirements on which he could make no or little progress.” *Id.* at 471. If the jury were inclined to believe the defendant really was only trying to revive his girlfriend, a necessity instruction would probably only present an unnecessary hurdle for an acquittal.

DEFENSES: SELF-DEFENSE: BY ARRESTEE, “CASTLE LAW,” DEFENSE OF PROPERTY

The law of self-defense pertaining to an arrestee apparently trumps the “castle law,” G.L. c. 278, § 8A, when it comes to a defendant arrested in her own home. In *Commonwealth v. Peterson*, 53 Mass. App. Ct. 388 (2001), the defendant was hosting a birthday party which included some underage drinking. A police officer, responding to noise complaints, entered the apartment (probably illegally, see *Commonwealth v. Kiser*, 48 Mass. App. Ct. 647, 651-652 [2000]) and announced his intent to seize two cases of beer. When the defendant objected, hostilities escalated, and ultimately the officer announced that he was arresting her. According to the defendant, the officer then grabbed her by the throat and arms and put her against the wall. Her ensuing resistance led to her conviction for assault and battery on a police officer. On appeal, she claimed that she was entitled under the “castle law” to an instruction that she was under no obligation to retreat from a person illegally present in her own home. The court ruled that the instruction was “inapposite” because an arrestee’s right to defend herself against excessive or unnecessary force is limited (even in the case of an illegal arrest) to “situations in which the option of physical retreat or avoidance of physical combat has already been foreclosed.” 53 Mass. App. Ct. at 390. Nor was any substantial risk of a miscarriage of justice created when the trial judge failed sua sponte to instruct the jury on the right to use reasonable force “to defend personal property from theft or destruction and real property from unwelcome invasion.” *Id.* at 392, quoting *Commonwealth v. Haddock*, 46 Mass. App. Ct. 246, 248-249 n.2 (1999). The evidence was clear that the altercation related to the seizure of the beer, rather than the officer’s entry of the apartment, and the beer was subject to seizure as evidence to support the charges related to the underage drinking.

DOUBLE JEOPARDY: DUPLICATIVE CONVICTIONS

The defendant was convicted after trial of a single count of mayhem and two counts each of armed assault with intent to murder and assault and battery by means of a dangerous weapon in connection with brutal razor attacks on two fellow prison inmates. *Commonwealth v. Diaz*, 53 Mass. App. Ct. 209 (2001). The Appeals Court rejects his claim that the assault and battery counts were duplicative of the armed assault with intent to murder counts because each of those two offenses requires an element of proof not required of the other (intent to kill in the latter and an actual battery in the former). *Id.* at 211-212. The Court also finds that “the law of the case,” based on the judge’s instructions, did not require a different result because those instructions, unlike the instructions in *Commonwealth v. Pinero*, 49 Mass. App. Ct. 397, 399 (2000), did not make an actual battery an element of armed assault with intent to murder. The assault and battery with a dangerous weapon conviction with respect to one inmate was, however, vacated because it was a lesser included offense of mayhem (second branch) and duplicated the defendant’s mayhem conviction based for the same conduct. The

Court relegates to a footnote the defendant's more substantial argument on this point: that the crimes were "so closely related in fact as to constitute in substance but a single crime." According to the Court, multiple convictions were appropriate "because he committed multiple violent acts on each victim." *Id.* at 211-212 n.4. The Court neglects to mention or discuss the apparent absence of instructions to the jury on this point. See *Commonwealth v. Maldonado*, 429 Mass. 502, 509 (1999) (suggesting that it is for the jury, properly instructed, to decide whether offenses "were separate and distinct acts or part of a single criminal episode").

DOUBLE JEOPARDY: DUPLICATIVE CONVICTIONS

In *Commonwealth v. Oliveira*, 53 Mass. App. Ct. 480 (2002), the defendant received consecutive sentences on convictions for indecent assault and battery and assault with intent to rape. The court assumes that the events in question "were so closely related in fact as to constitute a single criminal episode," *id.* at 483, but nonetheless upholds both convictions. The rule of *Morey v. Commonwealth*, 108 Mass. 433 (1871), suggests that two statutory offenses arising out of a single episode are not duplicative if each offense requires proof of an element that the other does not. Here, the Appeals Court acknowledges that the *Morey* test is not conclusive, but rather is aimed at determining legislative intent. Thus, even if offenses fail to pass the *Morey* test, separate sentences may be imposed if there is a clear expression of legislative intent to endorse that result, as in the case of a "school zone" violation under G.L. c. 94C, § 32J, and the underlying drug offense, see *Commonwealth v. Alvarez*, 413 Mass. 224 (1992). Conversely, even when offenses are not duplicative under the *Morey* test, separate sentences may be forbidden if there is an indication that the legislature intended such a prohibition, as in the case of vehicular homicide and manslaughter, see *Commonwealth v. Jones*, 382 Mass. 387 (1981). In *Oliveira*, the Appeals Court invokes the analysis of *Commonwealth v. Crocker*, 384 Mass. 353 (1981), where separate convictions (larceny and uttering a forged instrument) were upheld though based on the single act of passing a bad check. The *Crocker* opinion finds a legislative intent to allow separate convictions because of the distinct legislative purposes of the two statutory offenses: namely, to prevent theft in the case of larceny, and to protect the integrity of commercial and other legal instruments in the case of uttering. The *Oliveira* opinion stretches this rationale to the breaking point in concluding that the indecent assault and battery statute is designed to protect against unwanted, indecent touching, while the assault with intent to rape statute is designed to protect against "the threat of a violent, unwanted invasion of a woman's [sic] body." 53 Mass. App. Ct. at 486-487. This hair-splitting distinction in legislative purposes goes well beyond *Crocker*. It ignores the Supreme Judicial Court's admonishment "to consider 'the realities of the offenses and the circumstances within which they occur.'" *Commonwealth v. St. Pierre*, 377 Mass. 650, 663 (1979), quoting *Costarelli v. Commonwealth*, 374 Mass. 677, 684 (1978). It is a rare assault with intent to rape which does not also include an indecent assault and battery. The *Oliveira* result is in direct conflict with the holding of another panel of the Appeals Court in *Commonwealth v. Morin*, 52 Mass. App. Ct. 780, 787-788 (2001).

DOUBLE JEOPARDY: PRISON DISCIPLINE, PRE-TRIAL CONFINEMENT IN STATE PRISON

Double jeopardy principles of Massachusetts common law and the Fifth Amendment prohibit, among other things, multiple punishments for the same offense. In *Commonwealth v. Bloom*, 53 Mass. App. Ct. 476 (2001), the defendant was accused of killing another inmate while at MCI, Cedar Junction. In a prison discipline proceeding (for violating a rule “against killing,” among other infractions), he was “sentenced” to ten years in the Departmental Disciplinary Unit (“DDU”). When his term of imprisonment expired and his status was changed to “awaiting trial”, he was transferred from the DDU to the segregation unit at Cedar Junction, and he remained there until he was tried and convicted of second degree murder for the prison killing. Prison discipline is civil in nature and does not normally bar criminal prosecution for the same conduct, except perhaps in the case of a disciplinary penalty “so extreme in purpose or effect as to be equivalent to a criminal proceeding.” *Commonwealth v. Forte*, 423 Mass. 672, 676-677 (1996). The defendant’s claim that his confinement to the DDU created a double jeopardy bar to his trial for the killing was foreclosed by an earlier ruling in his case. See *Clark v. Commonwealth*, 428 Mass. 1011, 1012 (1998). As for his double jeopardy claim based on his pretrial detention at Cedar Junction, the court points out that under G.L. c. 276, § 52A, an inmate who has previously served state prison time, may be incarcerated pretrial in a state prison facility, rather than a jail. The defendant failed to show that such pretrial detention amounts to a separate punishment invoking Double Jeopardy protection. 53 Mass. App. Ct. at 478-479.

DOUBLE JEOPARDY: RETRIAL AFTER MISTRIAL

A motion in limine to bar mention that the OUI defendant had been offered a breathalyzer was allowed. The prosecutor properly instructed his first witness, an experienced police officer, to avoid mention of the fact. Nonetheless, in a “nonresponsive answer to an innocuous question” from the prosecutor, the officer volunteered the forbidden testimony. The trial judge entered a mistrial and later issued an order finding prosecutorial misconduct and barring retrial. *Commonwealth v. Curtis*, 53 Mass. App. Ct. 636 (2002). The Appeals Court reverses, treating the question of retrial as a double jeopardy matter. According to the Court, retrial may only be barred for “‘overreaching,’ ‘harassment,’ or other intentional misconduct on the part of the prosecution aimed at provoking a mistrial,” and the record here was insufficient to warrant such a finding. The Court is willing to assume that police misconduct is attributable to the prosecution, but “[t]here is no intimation here that the prosecutor or the officer sought to avoid the completion of the trial or acted in bad faith, that the Commonwealth’s case was lacking, or that irremediable harm to the defendant resulted.” *Id.* at 641. The Court was willing to acknowledge that a “reckless reference” might in some circumstances rise to the level of “overreaching,” but found that not to be the case here. *Id.* (The defendant’s cause was not aided when the trial judge accepted the officer’s post-mistrial apology in which he alleged it was “just a slip,” and defense counsel remarked, “I don’t think it was any free-willed intent.”)

ETHICS: POSING THIRD PARTY AS DEFENDANT

Playing out a fantasy only imagined by other criminal defense lawyers, counsel, hoping to confuse an identification witness seated in the courtroom, arranged for one of his own witnesses to come forward and pose as the defendant when the case was called. The

witness signed her name to a form acknowledging her next court date. The plan was foiled when a police officer alerted the prosecutor that the person who had come forward was not the defendant. Rather than immediately admitting the deceit, defense counsel at first insisted that the witness was his client. However, ultimately he conceded that a woman leaving the courtroom, who had been pointed out by the officer, was in fact the defendant. Later that day, a default warrant was issued for the defendant's arrest. Three days later, counsel, in court with his client, represented to the judge that the incident had been the result of "some confusion" and that he had not noticed that the woman who came forward was not his client. Following the judge's issuance of a *capias* for the arrest of the impersonator, counsel contacted the woman and his client and advised both of them to lie and tell the judge, as he had, that they were "confused." The impersonator eventually revealed all of the unseemly details in exchange for an agreement not to prosecute her. At the later trial of the defendant, the impersonator was called as a witness by defense counsel and the prosecutor used the impersonation incident to impeach her credibility. In response to a question from the judge, the witness said that the idea for the scheme was counsel's. Not surprisingly, the defendant was found guilty. No more surprisingly, defense counsel, for violation of ethics rules too numerous to list here, was suspended from the practice of law for eighteen months. *In the Matter of Gross*, 435 Mass. 445 (2001). The Court noted that counsel's "orchestration of the impersonation scheme before the court was a form of misrepresentation amounting to criminal contempt and obstruction of justice." *Id.* at 453.

EVIDENCE: CROSS-EXAMINATION OF TESTIFYING DEFENDANT

In *Commonwealth v. Santiago*, 53 Mass. App. Ct. 568, 572-573 (2002), the rape complainant wrote down the license plate of her assailant's vehicle. That number was traced to the defendant's Jeep, and the complainant's blood was found in the back seat of the Jeep. At trial, the defendant testified and, during cross-examination, the prosecutor asked him to explain how his license plate number came to be written down by the complainant, how the complainant could have predicted a blue sweatshirt worn by the defendant at the time of his arrest, and how the blood came to be in the back seat of the Jeep.. The Court holds that these questions neither impermissibly invited the defendant to comment on the credibility of another witness nor shifted the burden of proof to him. They merely "focused the jury on the implausibility of the defendant's" testimony. A similar burden-shifting claim was rejected in *Commonwealth v. Alcantara*, 53 Mass. App. Ct. 591, 597-598 (2002), discussed at Crimes: Drugs: Possession, where the defendant attributed the cocaine found in his bathroom to a tenant named Jose Medina, and the prosecutor cross-examined the defendant about whether he had looked for Medina after charges were brought against him.

EVIDENCE: DEFENDANT'S INVOCATION OF *MIRANDA* RIGHTS, OPENING DOOR

Following his arrest, a Mirandized murder defendant made incriminating oral statements to a state trooper who later reduced them to writing in a police report. After a second trooper took over the interview, the defendant requested a lawyer and all questioning ceased. At trial, the prosecution introduced the incriminating statements through the first trooper. In an effort to undermine the trooper's credibility, defense counsel cross-

examined him about his failure to give the defendant a chance to review his written report of the statements. In doing so, counsel opened the door to later testimony by the second trooper that he did not obtain a written statement from the defendant because the defendant invoked his right to counsel. The latter testimony did not violate the rule of *Doyle v. Ohio*, 426 U.S. 610, 617-619 (1976). Instead, it was an entirely appropriate response to defense counsel's insinuation that a written statement should have been taken from the defendant or that at least the defendant should have been given a chance to review the officer's written version of his oral statements. *Commonwealth v. Sleeper*, 435 Mass. 581, 593-594 (2002).

EVIDENCE: DEMONSTRATIVE; BUSINESS RECORDS

"Summary charts of voluminous evidence are permissible if they are accurate and fair, although care must be taken to insure that summaries accurately reflect the contents of the underlying documents and do not function as pedagogical devices that unfairly emphasize part of the proponent's proof." *Commonwealth v. Mimless*, 53 Mass. App. Ct. 534, 538 (2002), quoting *Welch v. Keene Corp.*, 31 Mass. App. Ct. 157, 165-166 (1991). In *Mimless*, the charts summarized billing data in the trial of a psychiatrist accused of Medicaid fraud. Although some of the data in the charts was disputed by defense counsel, the investigator who prepared the charts was available for cross-examination, and the alleged discrepancies went to the weight and credibility of the charts, rather than their admissibility. On the other hand, the trial judge did not abuse his discretion in excluding claim forms prepared by the defendant's former secretary which were proffered as business records. Under G.L. c. 233, §78, a judge has discretion to "require, as a condition of admissibility of business records, that the party offering the evidence call as a witness one who has personal knowledge of the facts stated in the records." 53 Mass. App. Ct. at 542.

EVIDENCE: DEMONSTRATIVE: DEFENDANT'S TATTOOS

In *Commonwealth v. Poggi*, 53 Mass. App. Ct. 685, 686-689 (2002), discussed at Identification: Suppression: Suggestiveness, the robber wore a short-sleeved shirt and held a gun in his hand. The defense at trial was mistaken identification. The judge refused to permit defense counsel to show the jury the large tattoos on the non-testifying defendant's forearms. This was reversible error. Because the proposed display was "demonstrative," rather than "testimonial," it would not have subjected the defendant to cross-examination by the prosecutor. Defense counsel had established an adequate foundation for the display by producing evidence (other than the testimony of the defendant) that the defendant had the tattoos at the time of the robbery and that they would have been reasonably noticeable by the eyewitnesses.

EVIDENCE: FAILURE OF DEFENSE WITNESS TO REPORT INFORMATION TO POLICE

In *Commonwealth v. Cintron*, 435 Mass. 509, 522-525 (2001), the Court upholds a prosecutor's cross-examination of defense witnesses about their failure to go to the police with evidence tending to exonerate the defendant. According to the Court, this failure is "akin to a . . . prior inconsistent statement" by the witness. The requisite foundation for such impeachment is well-settled: "that the witness knew of the charge against the

defendant in sufficient detail to realize that he possessed exculpatory information; that the witness had a reason to make the information available; that the witness was familiar with the means of reporting it to authorities; and that neither the defendant nor his lawyer asked the witness to refrain from disclosing the information.” *Id.* at 522.

PRACTICE TIP: The Court’s continued endorsement of this form of impeachment is troubling. It is a rare witness who takes the initiative to seek out the police or prosecutor to offer information tending to exonerate a defendant. Take the time to prepare your defense witnesses for possible cross-examination (or rehabilitation during your redirect) in this area. A credible explanation for the witness’s failure to go to the police will almost always be available. In some instances, the witness may simply not have wanted to “get involved” and may only have come forward when defense counsel sought him out (after the police negligently failed to do so). In the case of friends or relatives, they may have given their information to the defendant or his lawyer, confident that the defendant or counsel would see to it that the information

was appropriately used to ensure that justice was done. Whatever the witness's reason, take a few minutes to go over it with the witness so that your client will not be unfairly disadvantaged by this sort of cross-examination.

EVIDENCE: FOUNDATION: GANG MEMBERSHIP OF DEFENDANT

In *Commonwealth v. Cintron*, 435 Mass. 509, 520-521 (2001), the Supreme Judicial Court upholds the admission of testimony by a witness that the defendant was affiliated with the Netas gang. The witness said that he saw the defendant with Netas members while they were in jail together and that these Netas members beat him after he provided a statement to the police. This was, according to the Court, sufficient to show that the witness was testifying "based on his personal knowledge and, therefore, formed a sufficient foundation." *Id.*

PRACTICE TIP: Notwithstanding the casual conclusion in *Cintron* that this foundation was sufficient, examine closely the basis for any witness's testimony that your client is a member, or associates with members, of a street gang. If the witness bases his conclusion of gang membership on your client's association with other gang members, examine how the witness knows that these other persons are gang members, and how he knows that they are not simply friends or acquaintances of your client. The means other than hearsay by which one would be aware of someone's gang membership are actually quite limited: Admissions by the alleged gang member and observation of his participation in gang meetings are the only non-hearsay sources that come readily to mind. The better practice is to request a voir dire hearing on the subject before the damaging testimony is admitted. This will allow an uninhibited questioning of the witness outside the hearing of the jury and will provide you with an opportunity to cross-examine the witness to show a lack of foundation before, rather than after, the damaging testimony is heard by the jury. In addition to attacking the foundation for such testimony, challenge its relevance and argue that whatever probative force it may have is outweighed by its unfair prejudice to your client.

EVIDENCE: HEARSAY: CO-CONSPIRATOR'S STATEMENT

See *Commonwealth v. Melanson*, 53 Mass. App. Ct. 576 (2002), discussed at Crimes: Conspiracy.

EVIDENCE: HEARSAY: PRIOR CONSISTENT STATEMENT

The defendant was accused of murdering his live-in girlfriend's six-year-old son. The fatal blow - apparently preceded by a long history of brutal physical abuse - was a kick to the boy's stomach. The issue at trial was whether the defendant or the boy's mother, who testified for the prosecution, was responsible for the fatal blow. The mother had admittedly kept the child away from relatives to prevent them from seeing injuries to the child. She had also kept him out of school so that school officials would not see his injuries and report them to DSS (with whom she had had past experience). When police officers came to her home shortly after the EMT's on the date of the boy's death, the mother told them that her son had fallen down the stairs a few days before, but that she had not called a doctor out of fear that DSS would take the boy from her. Upon later learning that her son had been pronounced dead at the hospital, she told the police that

she was “going to tell the truth.” She then proceeded to describe a history of abuse of the boy by the defendant, which she repeated in large part in her trial testimony. The trial judge permitted the police officers to testify at trial about the mother’s out-of-court statements blaming the defendant for the boy’s injuries. The judge’s rationale was that the statements fell within the hearsay exception for statements against penal interest since the mother was ultimately charged with wantonly and recklessly allowing the abuse of her child. *Commonwealth v. Cruz*, 53 Mass. App. Ct. 393 (2001). On appeal, all parties agreed that this rationale could not be upheld, since the unavailability of the declarant is a precondition to the penal interest exception, and the mother was not only available, but actually testified, at trial. *Id.* at 398 & n.6. With this theory foreclosed, the prosecution tried to argue that the testimony fell within the exception for prior consistent statements and, alternatively, that its admission had not prejudiced the defendant.

The Appeals Court rejects both contentions. According to the Court, the prior consistent statement exception was inapplicable because the mother’s trial testimony was not attacked as recently contrived - on the contrary, she had, according to the defense, lied from the start. Nor did the prior statement predate her alleged motive to fabricate, since the motive to shift the blame for her son’s death from herself to the defendant was present when she spoke with the police after her son’s death. *Id.* at 402-403. The Court finds prejudice in the improperly admitted testimony not only because the statements to the police went beyond the mother’s trial testimony in critical respects, but also because it was admitted for its truth without limiting instructions (under the penal interest exception) rather than merely as corroboration of her trial testimony (as would have been the case if it had been admitted as a prior consistent statement). *Id.* at 403-407.

EVIDENCE: HEARSAY: PRIOR INCONSISTENT STATEMENT

A trial judge did not abuse his discretion when he refused to allow defense counsel to impeach a witness by playing a tape recording of her prior inconsistent statement. The recording included large segments of inadmissible hearsay. The defendant’s rights were adequately protected because the witness herself admitted each of the inconsistencies, and a police witness confirmed the precise wording of each inconsistent statement. *Commonwealth v. Daye*, 435 Mass. 463, 472-473 (2001)

EVIDENCE: HEARSAY: SPONTANEOUS UTTERANCE, ADMISSIBILITY, SUFFICIENCY TO SUSTAIN CONVICTION

In *Commonwealth v. Moquette*, 53 Mass. App. Ct. 615 (2002), the Appeals Court upholds a trial judge’s exercise of discretion in admitting as spontaneous utterances statements made to housing project security officers by the children of the defendant’s girlfriend. Her nine-year-old son, who was fleeing his home with her at 4:30 a.m. told the officers that the defendant had hit him, his mother, and his sister. The eleven-year-old sister, whom the officers found crying inside the apartment, told them that the defendant had hit her and her brother with a belt. In light of the children’s ages, the traumatic events were likely to produce sufficient fear and excitement to render the statements “spontaneous.” *Id.* at 617. More controversially, the Court also upholds the judge’s exercise of his “broad discretion” in admitting similar statements the children made to EMT’s forty minutes later. *Id.* at 618. As an aside, the Court notes that, if the children had been transported by ambulance to the hospital, their statements, as recorded in the EMTs’ trip

log, would likely have been admissible as part of the hospital records under a recent amendment to G.L. c. 111, § 70. *Id.* at 619 n.3. More interesting and helpful than the admission of these “spontaneous” utterances - which has become routine in even the most outlandish circumstances - is the Court’s *sua sponte* analysis of the sufficiency of such hearsay to sustain a conviction. Relying on the holding of *Commonwealth v. Daye*, 393 Mass. 55, 74 (1984), that prior inconsistent grand jury testimony which is recanted or contradicted by the witness at trial is substantively admissible but may not alone support a conviction, the Appeals Court holds the same with respect to spontaneous utterances. 53 Mass. App. Ct. at 619-623. Here, the boy and his mother both denied that the defendant hit him, and the sister’s testimony was silent on the subject. None of the three showed any sign that they were lying at trial to protect the defendant, and in fact each of them implicated him in several other serious crimes. The Court limits this holding to cases in which the declarant of the spontaneous utterance testifies at trial and contradicts the utterance and the witness is not impeached at trial with evidence of a motive to lie for the defendant. *Id.* at 623 & n.7. Here, there was no evidence other than the spontaneous utterance to corroborate that the defendant struck the boy, and his conviction for doing so was reversed. Interestingly, in concluding that the spontaneous utterance alone was insufficient to justify a conviction, the Court notes several factors undermining the reliability of such utterances, including that the traumatic circumstances which result in spontaneity may also implicate “an increased chance for error, confusion, or misstatement, both by the persons making the statements and by the persons hearing and reporting the statements.” *Id.* at 621-622. The Court remarks, however, that the hearsay exception for such utterances is “well entrenched.”

EVIDENCE: HEARSAY: SPONTANEOUS UTTERANCE, PERSONAL KNOWLEDGE REQUIREMENT

The declarant of an excited utterance may be a mere witness to, rather than a participant in, the exciting event. Although personal knowledge of the event by the declarant is a prerequisite to admitting the utterance, the statement itself may supply that foundation. An utterance by the witness that she “saw everything . . . China and Terry did it” did precisely that. *Commonwealth v. Harbin*, 435 Mass. 654, 657-658 (2002).

EVIDENCE: IMPEACHMENT, DELINQUENCY ADJUDICATION, PENDING CHARGES

In *Commonwealth v. Ortiz*, 53 Mass. App. Ct. 168, 179-181 (2001), the defendant contended on appeal that trial counsel had been ineffective in failing to impeach a key prosecution witness with a five-year-old delinquency adjudication and with criminal charges that were pending against him when he testified. The Court rejects this contention. The right to use a past delinquency adjudication to impeach a witness is not an “absolute right.” Unless the delinquency adjudication “has a rational tendency to show bias [sic],” it is not error to exclude it. *Id.* at 179. Here, the Court, without identifying the particular offense, finds no such tendency. With respect to the witness’s pending charges, the Court finds no difference between the grand jury testimony which the witness gave before he picked up the charges and his testimony at trial. This consistency dispels any likelihood that the witness’s testimony was affected by a desire to curry favor with the prosecutor in the hope of influencing his own fate on the pending

charges. *Id.* at 180. The Court also notes that “[g]enerally the mere failure to impeach a witness does not prejudice the defendant or constitute ineffective assistance.” *Id.*

EVIDENCE: IMPEACHMENT: PRIOR CONVICTION, REPRESENTED BY COUNSEL

A testifying defendant had been convicted of kidnaping and sentenced to M.C.I. - Concord more than ten years before. He had also been convicted of armed assault in a dwelling within the past ten years, but the prosecution produced no proof that in that case the defendant was represented by, or had waived, counsel. The governing statute, G.L. c. 233, § 21, only permits a witness to be impeached with a felony conviction (other than one for which he received a direct state prison - not a Concord reformatory - sentence) if the date of conviction is within ten years. There is an exception to this rule if the witness “has subsequently been convicted of a crime within ten years of the time of his testifying.” In *Commonwealth v. Saunders*, 50 Mass. App. Ct. 865 (2001), the Appeals Court held that the armed assault conviction did not trigger this exception because of the absence of evidence that the defendant had or waived counsel. The Supreme Judicial Court granted further appellate review and it now upholds the reversal of the conviction by the Appeals Court. *Commonwealth v. Saunders*, 435 Mass. 691 (2002). However, the Court announces a new rule for “cases tried after the date of this opinion.” Henceforth, because the concern for unrepresented defendants has been “rendered largely academic by the passage of time since . . . *Gideon v. Wainwright*, 372 U.S. 335 (1963), and [by] the adoption of [the SJC’s] rules” requiring appointment of counsel in felony cases, a “presumption of regularity” will apply. “[I]t will be presumed that the defendant had, or waived, counsel at the time of conviction, and the Commonwealth will not be required to produce additional proof of that fact to engage in otherwise permissible impeachment, unless the defendant has first offered some proof that his conviction was uncounseled.” 435 Mass. at 692. If the defendant offers “some proof,” the burden apparently then rests on the prosecution to establish representation or waiver before it may use the conviction to impeach the witness.

PRACTICE TIP: Bear in mind that this “presumption of regularity” is limited to prior felony convictions. 435 Mass. at 695 & n.5. A party wishing to impeach a witness with a prior misdemeanor conviction must still show that the witness had or waived counsel, since defendants in misdemeanor cases are not always entitled to counsel. See G.L. c. 211D, § 2A. Also, the language of the Court’s holding is limited to the use of prior convictions for impeachment of witnesses. *Id.* at 692, 695. The Court’s opinion does *not* address whether representation by counsel must still be established before a prior conviction may be offered in evidence to support a subsequent offender charge. Continue to object, move for a required finding, or both if the prosecution fails to show in a subsequent offender trial that your client had or waived counsel in the prior case. Argue that impeachment of a witness (even a defendant) with a conviction is different than using that conviction to support a subsequent offender verdict. As impeachment, it is collateral and much less significant to the trial. When the conviction forms the predicate for a long mandatory sentence in a subsequent offender trial, its integrity goes to the very heart of the case. It is not asking too much to insist that the prosecution make

the minimal effort necessary to show that the defendant was in fact represented by counsel in the prior proceeding.

EVIDENCE: IMPORTANCE OF RULES OF EVIDENCE

In a proceeding to dispense with the consent of a child's father to her adoption, an unsworn written statement of the child's foster mother was admitted in evidence under the supposed authority of a statute permitting foster parents to attend and "be heard" at such proceedings. In the course of holding the admission of the statement improper, the Supreme Judicial Court offers the following wisdom on the importance of rules of evidence and the clear showing of legislative intent required before those rules may be cast aside: "The rules of evidence stand guard to ensure that only relevant, reliable, noninflammatory considerations shape fact finding. Without these rules, there would be nothing to prevent trials from being resolved on whim, personal affections, or prejudice. We do not imagine that the Legislature intended to remove these safeguards in such important determinations without specifically indicating such an intention." *Adoption of Sherry*, 435 Mass. 331, 338 (2001).

EVIDENCE: PRIOR BAD ACTS, POSSESSION OF AMMUNITION

In *Commonwealth v. Daye*, 435 Mass. 463, 474-475 (2001), the defendant was charged with a murder committed with a .38 caliber bullet. It was not an abuse of discretion to admit evidence at trial that he had forty .38 caliber bullets in his possession when he was arrested ten months after the murder. "[I]t is commonly competent to show the possession by a defendant of an instrument capable of being used in the commission of the crime, without direct proof that that particular instrument was in fact the one used." *Id.* at 474, quoting *Commonwealth v. Toro*, 395 Mass. 354, 356 (1985). That the bullets were a different make than the ammunition used in the killing was "a factual issue to be determined by the jury, not a basis for excluding evidence." *Id.* at 475.

EVIDENCE: PRIOR BAD ACTS, PRIOR ARREST OF DEFENDANT

See *Commonwealth v. Vardinski*, 53 Mass. App. Ct. 307 (2001), further app. rev. granted, 436 Mass. 1101 (2002), discussed at Identification: Post-identification Suggestiveness, Right to Cross-examine; Dept. of Justice Guidelines.

EVIDENCE: PRIOR BAD ACTS, PRIOR DOMESTIC ABUSE TO SHOW HOSTILE RELATIONSHIP

Commonwealth v. Bianchi, 435 Mass. 316, 322-323 (2001), and *Commonwealth v. Stroyny*, 435 Mass. 635, 640-644 (2002), are recent additions to the long line of cases holding that a defendant's prior threats and acts of violence against the victim are relevant in a "domestic" homicide trial "to show the hostile nature of the relationship" and as evidence of the defendant's state of mind and motive to kill or injure the victim. It is for the trial judge to determine whether the evidence is more probative than prejudicial.

EVIDENCE: PRIOR BAD ACTS, REASON FOR RAPE COMPLAINANT'S DISCLOSURE

In *Commonwealth v. Aspen*, 53 Mass. App. Ct. 259, 269-270 (2001), summarized at Sexual Assault: Fresh Complaint, "Opening Door" to Stale Complaint; Permissible

Scope; “Piling on,” the complainant was properly allowed to testify that she ultimately reported the sexual assaults after a long delay because she was concerned that the defendant *might be* sexually assaulting her younger sister. The Appeals Court distinguished this testimony, which was only the complainant’s speculation, from the factual statement which created reversible error in *Commonwealth v. Montanino*, 409 Mass. 500, 505-507 (1991), where the complainant testified that he reported the abuse because he “found out it was still going on.”

EVIDENCE: PRIOR BAD ACTS, VIDEOTAPE OF PRIOR ASSAULT

At the defendant’s trial for murder as a joint venturer, the trial judge admitted as evidence of motive a videotape of the principal (the defendant’s brother) beating the victim with a baseball bat six months before the fatal shooting. The Supreme Judicial Court finds no abuse of discretion in the judge’s determination that the inflammatory nature of the evidence was outweighed by its probative force. *Commonwealth v. Cintron*, 435 Mass. 509, 518-519 (2001).

EVIDENCE: PRIVILEGE: ATTORNEY-CLIENT, CROSS-EXAMINATION ABOUT CIRCUMSTANCES OF GRANT OF IMMUNITY TO WITNESS

See *Commonwealth v. Sullivan*, 435 Mass. 722, 728-731 (2002), discussed at Evidence: Witness Testifying under Immunity Grant.

EVIDENCE: PRIVILEGE: PSYCHOTHERAPIST-PATIENT: SCOPE, FRUIT OF POISONOUS TREE ANALYSIS INAPPLICABLE

The day after robbing a Cape Cod bank at gunpoint, the defendant obtained an emergency appointment with his psychotherapist in Harvard. When he appeared for the appointment, he was distraught and claimed to have taken an overdose of medication. He admitted to robbing the bank and gave the therapist a loaded handgun that he was carrying. He agreed to the therapist’s request that he get treatment for the overdose at a local hospital. In connection with a call for an ambulance to transport him there, a police officer responded to the scene. The therapist told the officer what the defendant had said about the bank robbery. She also gave the defendant’s gun to the officer. After the officer determined that the defendant had no license to carry the gun, the defendant was placed under arrest at the hospital. Cape Cod authorities were notified of the defendant’s admission to the robbery. The next day, while he was in Clinton District Court to be arraigned on the gun charge, two Falmouth police officers spoke with him and obtained a confession to the robbery. The defendant sought to suppress the confession as a fruit of the therapist’s improper disclosure of his statements to her. *Commonwealth v. Brandwein*, 435 Mass. 623 (2002). The Court first notes that the statute establishing the psychotherapist privilege, G.L. c. 233, § 20B, unlike other privilege statutes (e.g., those for sexual assault counselors, G.L. c. 233, § 20J, psychologists, G.L. c. 112, § 129A, and social workers, G.L. c. 112, § 135A), does not include a general mandate of confidentiality. Instead, it only gives the patient a “privilege . . . of preventing a witness from disclosing” a protected communication “in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings.” The therapist’s disclosures here fell outside the statute because they were not “in any court proceeding [or] in any proceeding preliminary thereto.” 435 Mass. at 628-629. Although

the disclosures did not violate the statute, the Court was still willing to assume that they were a violation of the therapist's professional ethics. *Id.* at 630-631. However, this assumption did not help the defendant, because the "fruit of the poisonous tree" analysis does not apply to purely private misconduct. The exclusionary rule is only intended to discourage "official misconduct" - not purely private misconduct. *Id.* at 631-633. "That a private party may have breached some obligation of confidentiality in volunteering information to the police does not require the police to ignore that information." *Id.* at 631.

EVIDENCE: PRIVILEGE: SOCIAL WORKER-CLIENT, EXCEPTIONS

The statute establishing the social worker-client privilege contains an exception for any proceeding "in which the client introduces his mental or emotional condition as an element of his claim or defense, and the judge . . . finds that it is more important to the interests of justice that the communication be disclosed than that the relationship between the client and the social worker be protected." G.L. c. 112, § 135B. In *Commonwealth v. Stroyny*, 435 Mass. 635, 647-648 (2002), the defendant raised an insanity defense. His mental condition was critical to that defense. He did not object at trial when the social worker testified, but, if he had, "it would not have been error for the judge to allow the social worker to testify." *Id.* at 648.

EVIDENCE: STATE OF MIND, DSS TOLD RAPE COMPLAINANT'S MOTHER TO BRING HIM TO THERAPY

In *Commonwealth v. Ike I.*, 53 Mass. App. Ct. 907, 909 (2002), discussed at Witness: Competence, it was held to be error, albeit harmless in light of the strong evidence of guilt, to permit the rape complainant's mother to testify that "DSS told [her] to bring him to therapy." The mother's state of mind was not in issue, and the testimony - by suggesting that DSS believed the complainant had been raped - "tended to bolster the credibility of the Commonwealth's version of the facts."

EVIDENCE: STATE OF MIND, REASON FOR DEFENDANT'S FLIGHT

In *Commonwealth v. Daye*, 435 Mass. 463, 468 (2001), the defendant fled to Georgia some time after the murder with which he was later charged. At trial he offered testimony from his girlfriend that he had told her a month after the murder of his plans to leave the state because he "feared that the police were 'framing' him for the murder and that they would kill him 'because they are friendly with the [victim's] family.'" The Court distinguishes portions of this proposed testimony which reflect the defendant's "state of mind (i.e., that he was afraid of the police and intended to flee)" from those which "comprise[] statements of memory or belief (i.e., that police were 'framing' him and would kill him . . .)." *Id.* at 473. The implication seems to be that the former are admissible, while the latter are not, but the Court finds no need to decide this question. Any error in excluding the testimony "was of no consequence to the jury's assessment of the consciousness of guilt evidence," in light of the evidence that the judge allowed in and his instruction to the jury that flight could be due to fear of wrongful prosecution.

EVIDENCE: STATE OF MIND, VICTIM'S FEAR OF DEFENDANT

State-of-mind evidence of a homicide victim's fear of the defendant is admissible to rebut the defense position that she invited him into her home on the day of the killing.

Commonwealth v. Sleeper, 435 Mass. 581, 590 (2002). On the other hand, in *Commonwealth v. Bianchi*, 435 Mass. 316, 323-326 (2001), it was undisputed that the attack on the homicide victim by the defendant, her husband, was unprovoked. The only issue was whether he lacked the requisite malice because of an alleged mood disorder caused by steroid abuse. In that setting, it was, as the prosecution conceded, error to admit evidence of the victim's fear that the defendant would kill her. However, the error was harmless, because the jury would inevitably have inferred from other properly admitted evidence that the victim was in fear of the defendant, because the fear was not inconsistent with the mood disorder defense, and because the evidence of malice and premeditation was overwhelming.

EVIDENCE: SUICIDE NOTE, ADMISSIBILITY

A police search of a murder defendant's van following his arrest revealed a notepad which contained his handwritten notes about tasks arguably to be performed in preparation for the killing. The notepad also contained a suicide note written after the killing. The former was offered in evidence by the prosecutor and admitted by the judge. The defendant's attempt to enter the suicide note in evidence was rebuffed by the judge. *Commonwealth v. Bianchi*, 435 Mass. 316, 326-328 (2001). The judge's ruling excluding it is upheld because the suicide was inadmissible hearsay. "[A] suicide note purporting to explain past conduct is not admissible under the state of mind exception to the hearsay rule." *Id.* at 327. The penal interest exception was inapplicable because the defendant was available to testify at trial. The doctrine of verbal completeness did not apply, because the suicide note, although contained in the same notepad as the writing introduced by the prosecution, was written at a later time than it and did not in any way clarify its context. *Id.* at 327-328.

EVIDENCE: TELEPHONE CALL, FOUNDATION

Ten minutes before the defendant turned himself in at the police station for just having killed his wife, the wife's new boyfriend received a telephone call from a man who identified himself as "Joe" (the defendant's name) and told him "that he was going to pay and that his judgment day was near." The boyfriend recognized the voice from a previous call in which the caller claimed to be "Joe Sleeper." This foundation was sufficient to justify admitting the call in evidence. *Commonwealth v. Sleeper*, 435 Mass. 581, 590-591 (2002). "[T]he apocalyptic nature of the telephone call suggested that the caller was privy to circumstances that would fall imminently on [the wife's] male friend - he would soon learn that his relationship with [her] had ended because within ten minutes the defendant would tell police that he had killed her." *Id.* at 591.

EVIDENCE: WITNESS TESTIFYING UNDER IMMUNITY GRANT

A night of beer drinking and drug use by five young friends culminated in the murder of one of their number by several of the others. The prosecution obtained from a single justice of the S.J.C. a grant of immunity for one of the four survivors. At trial, the immunized witness was the prosecution's only eyewitness. He implicated the defendant in the killing and, along the way, disclaimed any personal involvement in it. In his

opening statement, the prosecutor told the jury without defense objection that the witness “was forced to testify by the Supreme Judicial Court. [It] granted him immunity and held that he testify or be held in contempt and go to jail himself.” *Commonwealth v. Sullivan*, 435 Mass. 722 (2002). The Court holds that this statement “is an accurate description of what immunity means,” notwithstanding the defense position at trial that, far from being “forced” to testify, the witness was “actually eager to obtain immunity in order to shift the blame from himself to others.” In his closing, the prosecutor repeated that the witness was “forced to testify” and added, “Now[, witness], you’re not gonna get by so easily as not being involved and not testifying against your friends. You are going to testify. And the only way you can get in trouble is if you lie.” The Court finds that this “colloquial transformation of what immunity means, while better not said, was not error.” *Id.* at 727. It did not unfairly communicate that the witness was reliable because of an admonition from the S.J.C. or because the prosecutor possessed independent knowledge from which he could tell if the witness testified untruthfully. The prosecutor was entitled to argue that, because of the grant of immunity, the witness had no legal consequences to fear from his testimony other than a charge of perjury if he lied. In the Court’s view, these assertions by the prosecutor merely represented his side of the argument; defense counsel was entitled to and did, in cross-examination and argument, present the opposing side. In that regard, the defendant contended on appeal that the trial judge had improperly limited, on attorney-client privilege grounds, his cross-examination of the witness about the circumstances leading to the grant of immunity. The Court observes that, although “an attorney’s advice to his client whether to accept the offer of the prosecution may be confidential . . . the attorney’s recitation of that offer [to the defendant] is not.” *Id.* at 729, quoting *Commonwealth v. Michel*, 367 Mass. 454, 460-461 (1975). The Court finds no error because defense counsel was permitted to, and did, explore in cross-examination who initiated the request for a grant of immunity. Of particular interest is the Court’s suggestion that defense counsel could “have called [the witness’s] attorney as a witness to inquire into that attorney’s conversations with the assistant district attorney regarding immunity. These conversations could not have been subject to attorney-client privilege, and they would have revealed the communications at the heart of the issue.” *Id.* at 730.

PRACTICE TIP: While the prosecutor’s words may have been “an accurate description of what immunity means,” it is difficult to believe that the prosecutor’s choice of words was intended as a disinterested description. Counsel should have requested, and would probably have been granted, a jury instruction, similar to that routinely given with respect to a prosecutor’s agreement with a witness for his testimony, to the effect that the fact that, although the court has granted the witness immunity for his testimony, it

neither knows nor has any way of determining whether he is telling the truth, and the grant of immunity should not in any way be viewed as an endorsement by the court of the truth of the witness's ultimate testimony. See *Commonwealth v. Meuse*, 423 Mass. 831, 832 (1996).

GRAND JURY: FAILURE TO PRESENT EXCULPATORY EVIDENCE

Before the grand jury, the prosecution's star witness admitted having had a few drinks, but denied any drug use on the night of the fatal shooting that she witnessed. At trial, she admitted having used cocaine that night. Nonetheless, the defendant's motion to dismiss due to the allegedly improper grand jury presentment was properly denied because there was "no indication . . . that the prosecutor knew of [the witness's] cocaine use at the time her testimony was presented to the grand jury." *Commonwealth v. Daye*, 435 Mass. 463, 468 (2001). A similar result is reached in *Commonwealth v. Ortiz*, 53 Mass. App. Ct. 168, 173-175 (2001), where an identification witness who testified before the grand jury recanted his identification on the eve of trial. In *Daye*, the Court also mentions in a footnote that the requisite probability of impact on the outcome of the grand jury proceedings was not shown. In this regard, the Court notes that the jurors at trial heard of the witness's cocaine use and nonetheless found the defendant guilty beyond a reasonable doubt. "It would be rational to assume, therefore, that a failure to disclose the same evidence to a grand jury seeking only *probable cause* would have had a negligible effect on their decision to indict." 435 Mass. at 468 n.2, quoting *Commonwealth v. LaVelle*, 414 Mass. 146, 151 N.2 (1993). The message seems to be that the denial of this sort of motion to dismiss can never be successfully appealed: An interlocutory appeal of the motion is not permitted; after trial and conviction, the jury verdict will apparently establish that the motion was ill-founded.

IDENTIFICATION: POST-IDENTIFICATION SUGGESTIVENESS, RIGHT TO CROSS-EXAMINE; DEPT. OF JUSTICE GUIDELINES

The vice president of a Boston business was opening its offices for the day when he was confronted by a stranger who forced him at gunpoint to open the company safe and turn over its contents, as well as his own wallet. The victim had ample opportunity to view the robber at a close distance and in good lighting. The defendant was charged in the robbery after his photograph was picked out by the victim two days later. The initial identification procedure could not have been less suggestive: Using the victim's description of the robber's height, weight, race, gender, and build, a police computer generated 999 mug shots meeting those criteria. The victim viewed one picture at a time on a computer screen, clicking the computer mouse to advance to the next picture. The victim selected the eighty-second picture - that of the defendant. Problems arose, however, when a police detective produced a hard copy of the picture for the victim to sign: The hard copy included various information about the defendant, including that he had been arrested on a firearm charge three months before. *Commonwealth v. Vardinski*, 53 Mass. App. Ct. 307 (2001), further app. rev. granted, 436 Mass. 1101 (2002). Although the identification procedures "may have in some respects fallen short of the ideal," the defendant's motion to suppress was properly denied because of the absence of suggestiveness in the initial identification and the fact that the victim was "emphatic" in selecting the picture of the defendant as the robber. *Id.* at 310. (Contrast *Commonwealth*

v. Bonnoyer, 25 Mass. App. Ct. 445, 448-449 [1988], where suppression was required because the witness's professed doubts about her selection of the defendant's photograph were helpfully allayed by a police investigator who told her not to worry because a suspect had confessed and named the defendant as his accomplice.) At trial, defense counsel wished to attack the identification by arguing that the victim's certainty was merely the product of the post-identification information about the firearm arrest. The risk of this strategy was obvious: The jury, no less than the victim, might find compelling evidence of the defendant's guilt in the unlikely coincidence that the person whose picture was selected as the perpetrator of a robbery at gunpoint just happened to have been arrested for a firearm offense only three months before. Over defense counsel's objection, the judge redacted the firearm arrest information from the photograph and refused to let counsel cross-examine the victim about this information. The Appeals Court reverses, holding it was error to foreclose this path to the defense. In essence, the Court rules that it was for defense counsel to decide whether to pursue the path in spite of its risks. *Id.* at 312-315. (But see *Commonwealth v. Day*, 42 Mass. App. Ct. 242, 246 [1997], where a similar choice by defense counsel was held to be ineffective assistance and resulted in reversal of the defendant's conviction.) Counsel's choice of strategy here was supported by knowledge that the firearm charge was noted on the photograph had been not proffered. The Appeals Court volunteers the opinion that counsel should be allowed to elicit that fact in order to counteract the prejudice created by the police error in showing the unsanitized picture to the victim, which in turn forced defense counsel to present evidence of the firearm arrest to the jury.

PRACTICE TIP: *Vardinski* is a useful reference in preparing and presenting a motion to suppress an identification. The opinion states that the "approved procedures" to avoid suggestibility in the identification process under current Massachusetts case law include: (1) photographs in an array should "hav[e] the same general characteristics described by the witness;" (2) the defendant's photograph should not "stand out;" (3) "police officers conducting the identification procedure [should] not possess information about the defendant and [should] make no gestures or comments concerning any set of photographs;" (4) the witness should not be "told where the photographs [come] from or who the individuals shown in them [are]." 53 Mass. App. Ct. at 311-312. The Court also refers favorably to the Department of Justice's October 1999 guidelines for identification procedures and specifically mentions several of the guidelines, including that (1) the photograph of the suspect that is selected for an array should be "reasonably contemporary and only one photograph of the suspect should be included;" (2) "[t]he investigator should . . . ensure that no writings or information concerning previous arrest[s] will be visible to the witness;" and (3) "[i]f an identification is made, [the investigator should] avoid reporting to the witness any information regarding the individual he/she has selected prior to obtaining the witness' statement of certainty." *Id.* at 312 n.4.

IDENTIFICATION: SUPPRESSION, SUGGESTIVENESS

Five employees and a customer were present during the robbery of a cleaning establishment. All six described the robber as wearing a blue, black, or dark shirt. Four of them said he had a goatee, while the other two described his facial hair as a beard.

The customer viewed some police photographs and selected one as “fairly close” to the robber in appearance. Using the facial features of that photograph, the police, with the aid of the customer, prepared a composite picture of the robber. A police officer who saw the composite noted a resemblance to the defendant, and subsequently the defendant’s picture was placed in a six-photograph array which was shown to each of the witnesses. The defendant was the only person in the array who was wearing a dark shirt. He was also the only one with a goatee, although three of the others had facial hair. Several of the employees picked the defendant’s picture from the array. Defense counsel did not move to suppress the identifications and did not object to their introduction at trial. The defendant raised the issue for the first time on appeal. *Commonwealth v. Poggi*, 53 Mass. App. Ct. 685, 689-695 (2002). The Court found itself unable to resolve the claim on the appellate record and left the matter for the trial judge upon remand. However, the Court’s opinion contains a helpful review of cases involving arrays in which the defendant’s photo stands out. The bottom line seems to be that suppression is in order unless the witness testifies that the distinctive feature in the defendant’s picture played no part in his selection of that picture. *Id.* at 691-694.

INTERSTATE RENDITION

See *Commonwealth v. Frias*, 53 Mass. App. Ct. 488 (2002), discussed at Sentencing: Time-served Credit, Out-of-State Jail Time While Awaiting Extradition, for a discussion of the provisions of the Uniform Criminal Extradition Act.

JOINT VENTURE: SUFFICIENCY OF PROOF, GETAWAY DRIVER

A robber ran from a jewelry store carrying a bag of jewelry and trays of necklaces. He jumped into a white Hyundai which was parked across the street. The defendant, the driver of the Hyundai, drove off quickly, soon followed by a police cruiser responding to a silent alarm from the jewelry store. The Hyundai was stopped after a high-speed chase. The robber fled on foot, but the defendant did not. The Hyundai, which was registered to the robber's wife, bore a recently stolen license plate. At trial, the defendant testified that he thought his companion was buying drugs rather than robbing a jewelry store. This version was corroborated by testimony of the robber. The Appeals Court finds the evidence sufficient to survive a required finding motion. *Commonwealth v. Batista*, 53 Mass. App. Ct. 642 (2002). Interestingly, the Court does not focus its analysis on the evidence pointing toward an agreement between the robber and the defendant before the robber entered the jewelry store. Instead, the Court relies on the principle that escape from the scene is a part of the robbery. The factfinder could reasonably infer that the necessary agreement was reached when the defendant saw the robber carrying the obviously stolen trays of jewelry and then drove him quickly away and sought to evade the police. *Id.* at 546-547. The reason for the Court's approach becomes apparent as one reads on: The judge in the jury-waived trial had stated, in announcing his verdict, that "[t]he question is whether or not [the defendant] knew that an armed robbery had just been committed." Appellate counsel attacked the judge's verdict, arguing that the defendant could not be convicted as a joint venturer in a crime that had already been committed when he first became involved. The Court rejects this claim, attributing to the judge the recognition of the fact that the robbery was not complete until the escape was made from the scene of the crime. *Id.* at 648.

JURY IMPANELMENT: GENDER-BASED PEREMPTORY CHALLENGES

In a rape trial, the prosecutor exercised peremptories to challenge thirteen of twenty-seven male jurors, while challenging none of the twelve female jurors who were seated. The trial judge refused to require the prosecution to justify its challenges, saying that the defendant had failed to make the requisite prima facie showing of a pattern of excluding women jurors based solely on their gender. *Commonwealth v. Aspen*, 53 Mass. App. Ct. 259, 261-265 (2001). The Appeals Court affirms. The Court rests its ruling on deference to the trial judge who was present at the impanelment and was in the best position to decide if a peremptory challenge appeared improper, on the fact that the prosecutor failed to challenge some men, and on the ultimate makeup of the jury - twelve men and four women. In light of the last point, the Court remarks, "the defendant cannot plausibly argue that he was deprived of his right to a fair and impartial jury as a result of the Commonwealth's challenges of some of the men called to serve as jurors." *Id.* at 264. (The Court does not refer in its reasoning to the fact that the defendant challenged twelve of sixteen female jurors, while challenging only three of the twenty male jurors who passed before him.)

PRACTICE TIP: *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the seminal case on gender-based peremptory challenges involved the jury trial of a complaint for paternity and child support brought against a male defendant. The prosecution used nine of its ten peremptory challenges to strike male jurors, and the defendant used the same

number to strike female jurors. Although the result was an all-woman jury, the Supreme Court addressed the likelihood that, in cases involving gender-based peremptory challenges, at least some members of the challenged gender would remain on the jury. The Court said, "It is irrelevant that women, unlike African Americans, are not a numerical minority and therefore are likely to remain on the jury if each side uses its peremptory challenges in an equally discriminatory fashion. . . . Because the right to nondiscriminatory jury selection procedures belongs to the potential jurors, as well as to the litigants, the possibility that members of both genders will get on the jury despite the intentional discrimination is beside the point. The exclusion of even one juror for impermissible reasons harms that juror and undermines confidence in the fairness of the system." 511 U.S. at 142, n.13. See also *Commonwealth v. Carleton*, 36 Mass. App. Ct. 137, 144-145, S.C., 418 Mass. 773 (1994) ("one need not eliminate one hundred percent of the discrete group to achieve an impermissible purpose;" a single discriminatory juror challenge is not "immunized by the absence of such discrimination" in the prosecutor's other challenges). . The defendant in *Aspen* raised on appeal a claim based on the right of jurors not to be excluded because of their gender, but the Appeals Court deals with that claim in a circular fashion, saying, "We need not consider this argument because no sufficient showing was made that the prospective jurors were excluded because of their gender." 53 Mass. App. Ct. at 265 n.3. The prosecutor's challenge of thirteen of twenty-seven male jurors, while challenging none of the twelve female jurors should have sufficed to show that gender was a critical factor in the challenges. See *Commonwealth v. Soares*, 377 Mass. 461, 490 (1979), cert. denied, 444 U.S. 881 (1979) (discriminatory pattern, which was established statistically where prosecutor challenged 92% of African American jurors and only 34% of white jurors, shifted the burden to the prosecutor to support his challenges with non-discriminatory reasons); *Commonwealth v. Hamilton*, 411 Mass. 313, 316-317 (1991) (67% of African American jurors and only 14% of white jurors challenged).

JURY IMPANELMENT: VOIR DIRE, EXPOSURE TO PRE-TRIAL PUBLICITY, ACQUAINTANCE WITH WITNESS, LATE PEREMPTORY

Commonwealth v. Stroyny, 435 Mass. 635, 638-639 (2002), involved a homicide which had been the subject of extensive pre-trial publicity. The trial judge refused defense counsel's request for individual voir dire. Instead, he asked the panel en banc whether they had any knowledge of the case from such publicity and inquired individually of those who responded that they had. He seated those who asserted at sidebar that they "could be fair and impartial." This procedure was, according to the Court, acceptable. The purpose of the voir dire is "not to determine to what views [the prospective jurors] may have been exposed," but "to determine whether [they] will set aside their own opinions, weigh the evidence (excluding matters not properly before them), and follow the instructions of the judge." Whether to accept a juror's declaration that she can be impartial "lies within the broad discretion of the trial judge."

In *Commonwealth v. Daye*, 435 Mass. 463, 470-471 (2001), a juror who lived near where the murder on trial occurred knew one of the witnesses in the distant past, but assured the judge that he could be fair and impartial. Having heard this unequivocal assertion, the judge was not obliged to grant defense counsel's request for further inquiry of the juror.

When this juror was seated, trial counsel did not challenge him. After the entire jury had been seated, counsel asked to challenge him belatedly, claiming that his earlier failure to challenge had been due to a misunderstanding between himself and the defendant. The judge's denial of this request was a proper enforcement of Rule 6 of the Rules of the Superior Court, which provides that, once a party has declined an opportunity to challenge a juror, "[n]o other challenging, except for cause shown, shall be allowed." The defendant's claim of ineffective assistance of counsel in connection with this miscommunication was unavailing in the absence of any showing that the presence of the particular juror likely affected the outcome of the case. *Id.* at 478.

In *Commonwealth v. Sleeper*, 435 Mass. 581, 587-588 (2002), a potential juror said that he was a friend of a Commonwealth witness but that he could nonetheless be impartial. As in *Daye*, the seating of the juror did not give rise to a substantial likelihood of a miscarriage of justice. Mere friendship with a potential witness, without more, does not disqualify a juror, and the judge may properly rely on a juror's assertion of impartiality. 435 Mass. at 588.

PRACTICE TIP: When confronted with a potential juror who is acquainted with a prosecution witness, do not be satisfied with the juror's assertion that she can be impartial. The juror may view lack of impartiality as a reflection on her own integrity and may therefore be reluctant to say that she cannot be "impartial." If the juror is one whose testimony will be important to the outcome of the case, state that fact on the record. Ask the judge to inquire of the juror whether she would be more (or less) inclined to believe the testimony of the particular witness based on her acquaintance with him. The juror may be more comfortable admitting such an inclination than admitting a lack of "impartiality."

JURY INSTRUCTIONS: CONSCIOUSNESS OF GUILT

The fact that the defendant killed his wife was not in dispute at trial. The only contested issue was whether the killing constituted murder or manslaughter. Defense counsel objected to the judge's consciousness of guilt instruction in connection with the defendant's disposal of the weapon used in the killing, since consciousness of guilt was irrelevant to deciding whether the killing was murder or manslaughter. The consciousness of guilt instruction was nonetheless appropriate, since it was relevant to the defendant's identity as the killer, and his concession that he killed the victim did not preclude the prosecution from offering evidence that he did so. *Commonwealth v. Sleeper*, 435 Mass. 581, 598-599 (2002).

JURY INSTRUCTIONS: ELEMENTS OF OFFENSE, AMBIGUITY

In both *Commonwealth v. Lapage*, 435 Mass. 480 (2001), and *Commonwealth v. Ware*, 53 Mass. App. Ct. 227 (2001), further app. rev. granted, 435 Mass. 1109 (2002), discussed at Crimes: Manslaughter: Jury Instructions, convictions are overturned because it cannot be determined with certainty that the jurors were not misled by the judge's instructions on the elements of the crime. "While it is certainly possible that the jury did not misunderstand the judge's instructions, we are not confident this was the case." *Ware*, 53 Mass. App. Ct. at 244. In *Lapage*, a later correct instruction on the subject did

not cure the erroneous explanation of the elements because it was not made clear to the jury that the correct instruction supplanted or carried more weight than the incorrect one. 435 Mass. at 484.

JURY INSTRUCTIONS: EXPLANATION OF “EVIDENCE” AND JUDGE’S ROLE IN ADMITTING EVIDENCE, WITNESS CREDIBILITY

The next time you start to “space out” during a judge’s instructions on such mundane matters as “what is evidence,” witness credibility, or the purpose of objections and sidebar conferences, recall the Appeals Court’s decision in *Commonwealth v. Richards*, 53 Mass. App. Ct. 333, 338-341 (2001). There, the trial judge defined “evidence” as “information of a reliable quality” and “of a very high quality” and told the jurors that his role in addressing issues relating to the admission of evidence is to ensure that only “high quality” information will come before them. The judge also repeated an error condemned in *Commonwealth v. Caramanica*, 49 Mass. App. Ct. 376, 379-380 (2001), when he told the jurors that “[v]ery few witnesses come to court with the conscious intent to mislead or to lie,” and that, in determining “credibility” the jurors should focus not on the truthfulness or untruthfulness of the testimony, but on how reliable it was. Although defense counsel in *Richards* had not objected, the Court found a substantial risk of a miscarriage of justice because the errors in these instructions “were thematic rather than fleeting and, taken as a whole, constituted an improper endorsement of the testimony of the Commonwealth’s witnesses which usurped the jury’s obligation to determine what testimony they would believe and how much weight to give to the evidence presented.” 53 Mass. App. Ct. at 340-341.

JURY INSTRUCTIONS: GENERAL INTENT

In *Commonwealth v. Ortiz*, 53 Mass. App. Ct. 168, 182-183 (2001), the trial judge erred when he told the jury that “[g]eneral intent is when we do things more or less by reflex.” See *Commonwealth v. Gunter*, 427 Mass. 259, 269 (1998). However, the defendant, who was on trial for assault and battery by means of a dangerous weapon, was not prejudiced by this error because, in his instruction on the elements of the offense, the judge told the jurors that the prosecution must prove “an intentional touching beyond a reasonable doubt and that the touching did not ‘happen accidentally.’” *Id.* at 183.

JURY INSTRUCTIONS: MISTAKEN IDENTIFICATION

In *Commonwealth v. Richards*, 53 Mass. App. Ct. 333, 337-338 (2001), the issue at trial was the identity of the perpetrator of two robberies. Reversible error occurred when, in addition to other errors in his jury instructions, the judge refused the defendant’s request for an instruction on the possibility of an honest but mistaken identification (see *Commonwealth v. Pressley*, 390 Mass. 617, 619-620 [1983]). The Appeals Court found the trial judge’s identification instructions (which did no more than paraphrase the instruction in *Commonwealth v. Rodriguez*, 378 Mass. 296, 310-311 [1979]) to be “a far cry” from the instruction on mistaken identification which was found adequate in *Commonwealth v. Payne*, 426 Mass. 692, 698 (1998). In another case, *Commonwealth v. Willard*, 53 Mass. App. Ct. 650, 659-662 (2002), discussed at Crimes: Breaking and Entering: Intent to Commit a Felony, Jury Instruction on Elements of Intended Felony, the Appeals Court finds neither ineffective assistance of counsel in counsel’s failure to

request, nor a substantial risk of a miscarriage of justice in the trial judge's failure to give, a *Pressley* instruction. According to the Court, although the defendant would have been entitled to the instruction on request, his rights were adequately protected by his counsel's able closing argument on the subject of misidentification and by the judge's instructions on burden of proof, presumption of innocence, witness credibility, and the prosecution's burden of proving the accuracy of its witness's identification beyond a reasonable doubt.

PRACTICE TIP: The results in *Richards* and *Willard* illustrate the importance of requesting a *Pressley* instruction in any case in which the identification of the defendant as the culprit is contested at trial. Reversal on appeal is essentially foreclosed on this ground unless counsel has asked the trial judge for the instruction.

JURY INSTRUCTIONS: PRESUMPTION OF INNOCENCE, REASONABLE DOUBT, BURDEN OF PROOF

A trial judge "need not give any particular content to the phrase 'presumption of innocence,' [as long as] the instructions make clear that an indictment [or complaint] does not imply guilt, and that the jury must base their decision on the evidence, and not on 'suspicion or conjecture.'" *Commonwealth v. Sleeper*, 435 Mass. 581, 600 (2002), quoting *Commonwealth v. Drayton*, 386 Mass. 39, 46 (1982). In both *Sleeper*, 435 Mass. at 599-600, and *Commonwealth v. Ortiz*, 435 Mass. 569, 579-580 (2002), the Court once more rejects attacks on the "moral certainty" language of the *Webster* "reasonable doubt" charge. In *Commonwealth v. Harbin*, 435 Mass. 654, 659-660 (2002), the judge misspoke when, in the course of explaining the possible verdicts in the case, he told the jurors, "if the Commonwealth has not proved its case beyond a reasonable doubt, the possible verdict is not guilty." However, this error did not create a substantial likelihood of a miscarriage of justice, because the judge correctly instructed the jurors "no less than twenty-two [other] times" that their "verdict *must be* not guilty" in that event.

JURY INSTRUCTIONS: "WILFUL BLINDNESS INSTRUCTION"

Counsel for a psychiatrist defendant charged with 219 counts of Medicaid fraud and two counts of larceny tried to portray him to the jury as an exceptionally busy doctor who was careless in his record keeping and relegated billing responsibility to his secretaries. *Commonwealth v. Mimless*, 53 Mass. App. Ct. 534 (2002). The trial judge instructed the jury that the prosecution had the burden of proving beyond a reasonable doubt that any billing errors were not the result of ignorance, mistake, or misunderstanding. The judge went on, however, to give a "wilful blindness instruction," telling the jurors that "if the Commonwealth has proved beyond a reasonable doubt that the defendant deliberately closed his eyes as what would have been obvious to him, then . . . you would be warranted in determining [that the element of knowledge] has been shown. . . . Stated another way, a defendant's knowledge of a particular fact may be inferred from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact." *Id.* at 545 n. 9. Such an instruction "is appropriate when (1) 'a defendant claims a lack of knowledge,' (2) 'the facts suggest a conscious course of deliberate ignorance, and' (3) 'the instruction, taken as a whole, cannot be misunderstood [by a juror] as mandating an inference of knowledge.'" *Id.* at 544, quoting *United States v.*

Hogan, 861 F. 2d 312, 316 (1st Cir. 1988). The Appeals Court holds that these three conditions were satisfied and the instruction was properly given.

MURDER: JURY INSTRUCTIONS

A judge may not instruct the jury in a murder case to consider whether the prosecution has proved murder in the second degree before turning to whether it has proved murder in the first degree. The reason for this rule is that “murder in the first degree and murder in the second degree cannot coexist.” The rule is *not* violated when the judge simply gives his instruction on second degree murder before his instruction on first degree murder. *Commonwealth v. Sleeper*, 435 Mass. 581, 596-597 (2002).

MURDER: MALICE: JURY INSTRUCTIONS

It is error for a trial judge to instruct the jury on second- or third-prong malice when a defendant is only charged with first degree murder based on deliberate premeditation. However, the error does not give rise to a substantial likelihood of a miscarriage of justice when the judge’s instructions on deliberate premeditation clearly convey to the jury the requirement of proof of a specific intent to kill. *Commonwealth v. Daye*, 435 Mass. 463, 478 (2001). The Supreme Judicial Court reaches the same conclusion in *Commonwealth v. Fletcher*, 435 Mass. 558, 561-564 (2002). In doing so, it distinguishes *Commonwealth v. Johnson*, 435 Mass. 113 (2001), where the error led to reversal, as a case in which the judge not only did not make the intent to kill requirement clear but also misdefined third-prong malice. 435 Mass. at 563.

MURDER: MALICE: JURY INSTRUCTIONS

Nine years after his second degree murder conviction for the death of his four-month-old daughter, the defendant filed a motion for a new trial. He claimed that the trial judge’s instruction on third-prong malice was erroneous. The Appeals Court agreed and ordered a new trial. *Commonwealth v. Azar*, 50 Mass. App. Ct. 767 (2001). The Supreme Judicial Court granted further appellate review, and now agrees that a new trial is required because the erroneous instruction created a substantial risk of a miscarriage of justice. *Commonwealth v. Azar*, 435 Mass. 675 (2002). The trial judge made the mistake - rather common at the time - of repeatedly telling the jury that third-prong malice could be inferred from “an act which, although it was not intended to kill or to cause grievous bodily harm [i.e., was not done with either first- or second-prong malice] was an act which, in the ordinary experience of people, was likely to lead to *serious bodily harm* or death.” Contrary to the judge’s instruction, only an act which is likely to lead to death can justify an inference of third-prong malice. The prosecutor compounded the error in her closing argument by inviting the jury to find third-prong malice based on the likelihood that the defendant’s acts would cause serious injury. The Court finds there enough conflict in the expert testimony so that, although the prosecution’s case was strong, it was not incontrovertible, and the presence of malice could not be “ineluctably inferred” from the evidence. Commendably, the Court refuses “to sit as a second jury” and limits its role to determining “whether the evidence required the jury to find that a plain and strong likelihood of death would follow the defendant’s actions.” *Id.* at 689.

A contrary result is reached in *Commonwealth v. Stroyny*, 435 Mass. 635, 648-649 (2002), where the severity of the attack (three stab wounds to the back, each of which penetrated at least five inches and would have been fatal in minutes) could not have

warranted a finding of anything less than a strong likelihood of death. For similar reasons, the Court in *Stroyny* is also willing to overlook the trial judge's error in using language forbidden by *Commonwealth v. Eagles*, 419 Mass. 825, 836 (1995), identifying malice as a "frame of mind which includes not only anger, hatred and revenge, but also any other unlawful and unjustifiable motive." Finally, the Court forgives the judge's erroneous failure to instruct the jury "that a defendant's mental impairment must be considered on the third prong of malice" in determining the state of the defendant's knowledge at the time of the killing. The error was harmless because there was "no evidence that the defendant did not know the circumstances." His testimony that

“he could not remember what happened between the time he punched the victim and broke her nose, and when he saw her dead on the floor” was, according to the Court, insufficient to raise the issue. *Id.* at 649-650.

MURDER: MALICE, REASONABLE PROVOCATION AS AFFECTING

See *Commonwealth v. Lapage*, 435 Mass. 480 (2001), discussed at Crimes: Manslaughter: Jury Instructions.

MURDER, FIRST DEGREE: § 33E RELIEF

In *Commonwealth v. Cintron*, 435 Mass. 509, 525-526 (2001), the defendant was charged as a joint venturer in a shooting death. The principal pled guilty to manslaughter. The defendant himself was thrice offered, and thrice refused, the same offer. He was convicted after trial of first degree murder. In reviewing his conviction under G.L. c. 278, § 33E, the Supreme Judicial Court concludes that neither the lenient treatment of the principal nor the generous pretrial plea offer to the defendant justify relief from this conviction. The Court quotes the trial judge’s observations that the disparity of results between the defendant and the principal was “unfortunate” and that the consequences of the defendant’s rejection of the plea offer were “quite grave,” but that he was “the author of his own woes.” *Id.* at 526 & n.8. The bottom line for the court is that the evidence was sufficient to support the first degree murder verdict.

PRACTICE, POST-CONVICTION: MOTION FOR NEW TRIAL

In *Commonwealth v. Harding*, 53 Mass. App. Ct. 378, 381-382 (2001), summarized at Crimes: Drugs: Distribution: Entrapment, Outrageous Police Conduct, reversal of the denial of the defendant’s new trial motion was required because the judge made no findings on the motion and, without findings, the Appeals Court could not determine the reason for the decision. The Court also faulted the prosecution for failing to produce a counter-affidavit from defendant’s trial counsel, which it “was in the best position to obtain.” *Id.* at 380.

PRACTICE, POST-CONVICTION: MOTION FOR NEW TRIAL

Dr. Wesley Profit, the former forensic director at Bridgewater State Hospital, testified for the prosecution at the defendant’s murder trial. Unbeknownst to defense counsel or the prosecutor, Dr. Profit was at the time of trial being sued civilly for sexual misconduct. Disciplinary proceedings against him in that and another matter involving alleged sexual misconduct were also pending before the Board of Registration of Psychologists. No criminal investigation had been undertaken. Dr. Profit was not seeing patients, but he continued to perform his supervisory and administrative duties at Bridgewater. Following the defendant’s conviction, this information came to light and defense counsel moved for a new trial. *Commonwealth v. Sleeper*, 435 Mass. 581, 604-607 (2002). The trial judge’s denial of the motion was, according to the Court, proper. His finding that Dr. Profit was “not a member of the prosecution team” was supported by the evidence and was not plainly wrong. *Id.* at 605. (The “prosecution team” includes “members of [the prosecutor’s] staff and . . . any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to [the prosecutor’s] office.” *Id.* quoting *Commonwealth v. Daye*, 411

Mass. 719, 734 [1992].) Evidence of Dr. Profit's pending difficulties would not have been admissible to show bias since no criminal investigation was pending and, in fact, the prosecutor was totally unaware of those difficulties at the time. Nor would the evidence, if admitted, have created a reasonable doubt that did not otherwise exist. *Id.* at 605-606.

PRACTICE, POST-CONVICTION: MOTION FOR NEW TRIAL, "NEWLY-AVAILABLE EVIDENCE"

The defendant was convicted of first degree murder as a joint venturer in a shooting in which his brother fired the fatal shot. He filed a motion for a new trial based on the "newly available" testimony of his brother, who had previously invoked his Fifth Amendment privilege, but was now willing to testify that the defendant had tried to dissuade him from shooting the victim. The Supreme Judicial Court affirms the denial of the new trial motion. *Commonwealth v. Cintron*, 435 Mass. 509, 516-518 (2001). In doing so, the Court, announces that "[t]he standard applied to a motion for a new trial based on newly available evidence is the same as applied to one based on newly discovered evidence." The question for the judge is "whether there is a substantial risk that a jury would reach a different conclusion if presented with the newly available evidence." *Id.* at 516. An appellate court will reverse the denial of a new trial motion "only to avoid manifest injustice," which "is not shown merely by producing evidence that might have influenced the trier of fact to reach a different conclusion if presented The evidence must be potent, pertinent, and creditworthy to fundamental issues in the case." *Id.* at 517. According to the Court, "[t]he testimony of a codefendant who did not testify at trial is the 'weakest sort of evidence.'" Here, the brother's testimony was not credible. Moreover, it was cumulative of other testimony at trial, "and that type of evidence carries less weight than new evidence different in kind." *Id.* at 518.

PRACTICE, POST-CONVICTION: MOTION FOR NEW TRIAL, RELATION TO DIRECT APPEAL

In *Commonwealth v. Montgomery*, 53 Mass. App. Ct. 350 (2001), the Appeals Court explains the limits of a trial court's authority to address a new trial motion under Mass. R. Crim. P. 30(b) while the defendant's direct appeal is pending: The motion may be accepted for filing in the trial court regardless of the pendency of the appeal. However, the court may not hold a hearing or take any other action on the motion once the defendant's appeal has been docketed in the appellate court, unless an application for a stay of the appellate proceedings is granted by the appellate court. Although there is no provision in the Rules of Appellate Procedure for a motion to stay an appeal, such motions "are permitted as a matter of practice" and will usually be granted, unless the issues raised in the new trial motion are similar to those raised in the direct appeal or the briefing of the appeal has been completed. 53 Mass. App. Ct. at 353-354 & n. 7. The Court is careful to point out that a pending appeal does not limit the trial court's power to hear and decide a motion to correct an illegal sentence under Rule 30(a) or a motion to revise or revoke under Rule 29. *Id.* at 355.

PRACTICE, POST-CONVICTION: MOTION FOR NEW TRIAL, STANDARD OF REVIEW

In *Commonwealth v. Azar*, 435 Mass. 675, 685-686 & n. 7 (2002), discussed at Murder: Malice: Jury Instructions, the Supreme Judicial Court reiterates that the standard of review it applies to the denial of a post-appeal new trial motion is the substantial risk of a miscarriage of justice standard, regardless of whether the motion judge has addressed the merits of the claims raised by the defendant in the motion. This standard of review is essentially the same as the standard applied when a defendant who was represented by the same attorney at trial and on appeal uses a new trial motion to raise a claim that his attorney was ineffective in failing to raise a jury instruction issue in the trial or appeal. *Id.* at 686-687. Under the substantial risk standard, the Court determines whether it has “a serious doubt whether the result of the trial might have been different had the error not been made.” *Id.* at 687, quoting *Commonwealth v. LeFave*, 430 Mass. 169, 174 (1999). The Court in *Azar* notes that the six-year delay from the affirmance of the conviction on appeal to the filing of the new trial motion did not constitute a waiver of the issues raised in the motion, since Rule 30(b) allows the motion to be filed “at any time.” 435 Mass. at 690.

PRACTICE, POST-CONVICTION: MOTION TO WITHDRAW PLEA

Twelve years into a twenty year Concord sentence for rape of a child, the defendant moved to withdraw his plea of guilty, claiming that the plea, encouraged by the judge’s remark that the Concord sentence “under the present procedures, . . . means you would serve two years,” was not knowingly and intelligently proffered. In a scathing opinion that arguably ignores misconceptions about Concord sentences prevalent at the time of the defendant’s plea, the Appeals Court upholds the exercise of discretion by the judge (who was not the plea judge) in denying the motion. *Commonwealth v. Thurston*, 53 Mass. App. Ct. 548 (2002). The Court notes that a risk of prejudice to the prosecution “inevitably inheres in a motion seeking to overturn an ancient conviction.” *Id.* at 552. In concluding that the defendant’s affidavit was not credible, the Court points to the facts (1) that he delayed almost ten years beyond the supposed two-year release date before bringing his motion to withdraw the plea; and (2) that he was represented by competent counsel throughout the plea and sentencing and that he failed to include with his motion an affidavit from his original attorney or an explanation of that absence - an omission which was particularly noteworthy in light of allegations in the defendant’s own affidavit about assurances counsel gave him at the time of his plea that he would serve no more than two years. The Appeals Court opines that the experienced plea judge’s remark was intended and understood to express only the defendant’s parole eligibility and not to promise his release. The Court also insists that the sentence was a bargain for the defendant, who admitted his guilt and would have faced the possibility of life in prison after trial and conviction. What is troubling about this decision is that plea counsel undoubtedly could have negotiated a 4 to 6 or 5 to 7 year state prison sentence instead of the Concord sentence. The Concord sentence for rape of a child was a trap for the unwary defendant whose likelihood of parole for the offense was probably nil regardless of his behavior while incarcerated. The sting of the decision is assuaged, however, by the revelation that the defendant, unbeknownst to the plea judge, had previously served a state prison sentence for a similar offense in Pennsylvania.

PRACTICE, POST-CONVICTION: RULE 25(b)(2) MOTION, TIMELINESS

In *Commonwealth v. Guy G.*, 53 Mass. App. Ct. 271 (2001), summarized at Sexual Assault: Open & Gross Lewdness; Lewd, Wanton & Lascivious Person, the Appeals Court makes it clear that a motion for reduction of a conviction to a lesser included offense under the second sentence of Rule 25(b)(2) is not subject to the same five-day filing deadline as a renewed motion for a required finding of not guilty under the first sentence of Rule 25(b)(2). Motions under the second sentence (including apparently motions for entry of a finding of not guilty for reasons other than entitlement to a required finding) “are without limit of time in the same sense as motions for a new trial under Mass.R.Crim.P. 30(b).” 53 Mass. App. Ct. at 278.

PROBATION SURRENDER: DISCREPANCY BETWEEN DOCKET ENTRIES AND SIGNED CONDITIONS OF PROBATION

In *Commonwealth v. MacDonald*, 435 Mass. 1005 (2001), the docket entries stated that the defendant was ordered to “stay away” from the victim. However, the written conditions-of-probation form which the defendant signed stated that he was also to have “no contact” with the victim. (See *Commonwealth v. Finase*, 435 Mass. 310 (2001), discussed at Crimes: Domestic Abuse, “Stay Away” Order, for a discussion of the difference between a “stay away” and a “no contact” order.) The Supreme Judicial Court holds that the conditions imposed by the sentencing judge are the determinative factor, and that the written probation conditions have no contractual or other independent effect, notwithstanding that the defendant signed them. “The defendant is in violation of his probation only if he disobeys the conditions of probation imposed by the sentencing judge.” *Id.* at 1007. While the docket entries are prima facie evidence of those conditions, they may be rebutted by other evidence. Here, the Court observes that the judge who sentenced the defendant to probation had presided at an earlier violation of probation hearing involving the defendant’s “failure to have *no contact* with victim.” In that hearing, the sentencing judge found him in violation, extended his probation and, according to the docket entries, reimposed a “*stay away*” condition. The Court considers this “some evidence” that the docket entries did not accurately reflect the conditions imposed by the judge, and it remands the case for findings “regarding the conditions of probation imposed by the sentencing judge.” *Id.*

PROBATION SURRENDER: DUE PROCESS REQUIREMENTS: FINDINGS BY JUDGE, DEFENDANT'S PRIOR RECORD

In *Commonwealth v. MacDonald*, 53 Mass. App. Ct. 156, 157-159 (2001), the Appeals Court holds that it was improper for the probation officer to summarize the defendant's criminal record ("a total of 57 entries on his record, and he's all of 19 years old") at the stage of the probation surrender hearing when the judge was deciding whether a violation had occurred. The Court also had "no doubt" that the judge's failure to make findings on the evidence and give reasons for revoking the defendant's probation "constituted error." The probation officer's statement about the defendant's record made it "particularly important that the judge make findings" - presumably to dispel any concern that this information played a part in the violation finding. *Id.* at 159. Nonetheless, the Court finds that this due process violation was "harmless beyond a reasonable doubt" because the evidence of the probation violation was undisputed and overwhelming. As for the reference to the defendant's record, the court observes, in defense of the probation officer, that the judge "invited" him to provide this information. Ironically, in spite of this "invitation," the Court finds no risk of error because "[u]ndoubtedly the judge knew he could not consider information about the defendant's criminal record on the violation issue, and we will assume that he correctly instructed himself on that point, absent a showing to the contrary." *Id.* at 161.

PRACTICE TIP: Defense counsel objected to the information about the defendant's record, but the judge never ruled on the objection. *Id.* at 158. The Appeals Court enigmatically asserts that "the record . . . does not support the . . . claim that the defendant's record was admitted in evidence over the defendant's objection." The Court seems to be saying that the judge did not admit or consider the evidence. Counsel would have been well advised to politely insist that the judge vocally rule on his objection. Such a ruling would not only have clarified whether the offending information was allowed in evidence; it would also have shed light on whether the judge actually did "correctly instruct[] himself" on the irrelevance and inadmissibility of this information on the violation issue.

PROBATION SURRENDER: DUE PROCESS REQUIREMENTS: HEARSAY

Probation surrender proceedings against the defendant were commenced following a domestic disturbance in which his live-in girlfriend suffered a bruised cheek. At the surrender hearing, the prosecution's only evidence of the alleged violation was the testimony of the officer who responded to the disturbance. He testified that the girlfriend had a fresh bruise on her cheek and blood spots on her sleeve; that she at one point said the defendant had punched her, but later recanted that claim; and that she expressed concern that the defendant might hurt her child, but refused to sign the police report, saying that she did not want to get the defendant in trouble. The girlfriend testified for the defense at the surrender hearing, telling the judge that she bruised her face when she fell out of a car. Another defense witness - a friend of the girlfriend - supported this explanation of the bruise. The judge found that the defendant had violated his probation by intentionally hitting his girlfriend in the face, and the Appeals Court upholds that finding. *Commonwealth v. Harrigan*, 53 Mass. App. Ct. 147 (2001). The Court endorses defense counsel's failure to object to the officer's hearsay testimony because, under Rule

6(a) of the District Court Rules for Probation Violation Proceedings, “[h]earsay evidence [is] admissible at probation violation hearings.” *Id.* at 149. The Court rejects the claim that the evidence of the violation was insufficient under Rule 6(b), which provides: “Where the sole evidence submitted to prove a violation . . . is hearsay, that evidence shall be sufficient only if the court finds in writing (1) that such evidence is substantially trustworthy and demonstrably reliable and (2), if the alleged violation is charged or uncharged criminal behavior, that the probation officer has good cause for proceeding without a witness with personal knowledge of the evidence presented.” According to the Court, the purpose of this rule is to protect the probationer’s due process confrontation rights. That purpose was not implicated here because the hearsay declarant (i.e., the girlfriend) did in fact testify, albeit as a defense witness. *Id.* at 150. The Court does not specifically address the requirement of the first clause of the rule that “the court find in writing . . . that such evidence is substantially trustworthy and demonstrably reliable.” Such a finding may perhaps be implicit in the judge’s written finding that the defendant hit his girlfriend in the face, and the Court’s conclusion that the evidence of the violation met the preponderance of the evidence standard may perhaps be an endorsement of that finding. One wonders, however, whether, the violation would have been upheld if the officer had not seen the fresh bruise on the girlfriend’s face and the blood on her sleeve.

PROBATION SURRENDER: PIECEMEAL IMPOSITION OF CONCURRENT SUSPENDED SENTENCES

Convicted on four complaints in district court, the defendant was sentenced on each to concurrent two and one-half year split sentences - eighteen months to be served directly and the balance of each to be suspended with probation. One of the conditions of probation was to pay restitution. The defendant subsequently violated his probation by committing a new offense and failing to pay restitution. Having found this violation, the district court judge imposed the one-year balance of the split sentence on three of the four complaints, but extended the probation on the fourth for the purpose of requiring the defendant to complete payment of the restitution. The defendant did not appeal. Seven months later, however, he filed a motion to terminate the probation on the fourth complaint, arguing that the judge had no authority to extend that probation. He appealed the ensuing denial of this motion, as well as a subsequent order finding him in violation of the probation and imposing the suspended portion of the sentence. The Appeals Court agrees with the defendant. *Commonwealth v. Bruzzese*, 53 Mass. App. Ct. 152 (2001), further app. rev. granted, 435 Mass. 1107 (2002). Under *Commonwealth v. Holmgren*, 421 Mass. 224, 228 (1995), a judge may not change the original sentence after a revocation of probation. Here, the obvious intent at the original sentencing was “to bundle all of the offenses in the four complaints into one sentence of two and one-half years by making them concurrent. The effect of the judge’s actions following the probation violation was to improperly increase the sentence to three and one-half years in violation of *Holmgren*. Imposition of the suspended portion of the sentence for the fourth complaint violated the defendant’s double jeopardy rights, since he had in effect already served that time following the first probation violation.

PRACTICE TIP: The Supreme Judicial Court has granted further review of the *Bruzzese* decision, and it remains to be seen whether the Appeals Court’s ruling survives. If it

does, an open question remains as to what, if any, effect the ruling would have on concurrent terms of “straight probation.” In such cases, unlike in cases involving a suspended sentence, the sentencing judge has not pre-ordained the appropriate total period of incarceration, and the *Holmgren* rule against changing the original sentence would not appear to be violated by imposing a sentence on one charge while continuing the probation on another. Depending on the circumstances, application of the *Bruzzese* ruling may or may not be in the defendant’s interest. For example, when the probation violation does not involve a serious new offense, defense counsel may wish to argue for imposition of a jail sentence on a misdemeanor and continuation or extension of the probation for an offense which requires a state prison sentence. On the other hand, when a hefty sentence is imposed on one charge for the probation violation, but the judge wants to extend the probation on another charge to enforce an order of restitution or to keep the defendant under the scrutiny of a probation officer, defense counsel may wish to argue that *Bruzzese* forbids such piecemeal disposition of what was originally established by the sentencing judge as a single, concurrent term of probation.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, COMMENT ON DEFENDANT’S INTEREST IN THE OUTCOME AS AFFECTING HIS CREDIBILITY

In *Commonwealth v. Sleeper*, 435 Mass. 581, 594-595 (2002), appellate counsel argued that a prosecutor’s invitation to the jury to consider the testifying defendant’s interest in the case in assessing his credibility as a witness improperly suggested that the defendant should be disbelieved simply because he

was indicted. The Supreme Judicial Court rejects this argument: “When a defendant testifies on his own behalf, he exposes himself to cross-examination as would any witness.” The prosecutor’s argument was “entirely appropriate.” *Id.* at 595.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, DEROGATORY REFERENCE TO DEFENSE TACTICS

In *Commonwealth v. Harbin*, 435 Mass. 654, 661 (2002), the Court holds that “[t]he prosecutor’s occasional reference . . . to what [defense] counsel would have the jury believe was a permissible rhetorical device.”

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, IMPLICATING DEFENDANT’S FAILURE TO TESTIFY

In *Commonwealth v. Buzzell*, 53 Mass. App. Ct. 362 (2001), the defendant was convicted of the rape and indecent assault and battery of his young stepdaughter. The offenses allegedly occurred while the defendant and the child were alone in his bedroom or car. The child’s sister and mother testified to various times when she and the defendant were alone together. The defendant did not testify or call any witnesses. In her closing argument, the prosecutor repeated four times that it was “uncontradicted” or “uncontroverted” that the defendant and the child were alone together on particular occasions. Each time the prosecutor asked rhetorical questions, such as why did the bedroom door need to be locked or why did they need to be alone in the car together. The Appeals Court reverses of the defendant’s convictions because the prosecutor’s argument amounted to a comment on the defendant’s failure to take the stand at trial and invited the jury to penalize him for exercising that right. The Court reviews the law on this subject in some detail, noting the position of the First Circuit Court of Appeals that a prosecutor’s characterization of evidence as “uncontradicted” automatically requires reversal unless the judge interrupts, instructs then and there on the defendant’s right not to testify and the jury’s obligation not to draw inferences unfavorable to the defendant therefrom, and states that the prosecutor “was guilty of misconduct.” See *United States v. Flannery*, 451 F.2d 880, 882 (1st Cir. 1971). While the Massachusetts state courts have not taken so strong a stand, the prosecutor’s infractions here were deemed particularly serious because of her manner of juxtaposing the “uncontradicted” assertions with rhetorical questions that only the defendant could answer, thus reminding the jurors that he in fact had not answered them. The infractions were not cured by the judge’s “correct but generalized references to the presumption of innocence, the Commonwealth’s burden of proof, and the requirement that the jury’s decision be based solely on the evidence. 53 Mass. App. Ct. at 370-371.

PRACTICE TIP: The intonation of the words “uncontested,” “uncontradicted,” or “uncontroverted” in a prosecutor’s closing argument should set off an alarm in defense counsel’s head. Such terms, when used in connection with material facts, “invariably approach the border of the forbidden territory of speculation regarding the absence of testimony by the defendant.” *Id.* at 366. Beware also of rhetorical questions which only the non-testifying defendant would reasonably be able to answer. See *Commonwealth v. Habarek*, 402 Mass. 105, 111 (1988).

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, IMPLICATING DEFENDANT'S FAILURE TO TESTIFY

In *Commonwealth v. Melanson*, 53 Mass. App. Ct. 576, 582-583 (2002), discussed at Crimes: Conspiracy, the conspiracy defendant did not take the stand in his defense. In closing argument, the prosecutor remarked about the many prosecution witnesses who attested to the obvious impropriety of the alleged conspiratorial scheme. He then said: "The only person that doesn't want to acknowledge that fact is [the defendant]. The only person that doesn't want to acknowledge that he was misrepresenting to Star Market. . . . " The Appeals Court asserts that this statement was at most an "oblique reference" to the defendant's failure to testify, and that it "could readily be understood simply in the sense of setting up a contrast between the strength of the Commonwealth's case and the manifest weakness or vacuity of the defendant's case." The judge's prompt instruction to the jurors to "totally disregard[]" the statement removed any residual concern that the defendant might have been prejudiced by the remark.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, MEANING OF IMMUNITY GRANT TO WITNESS

See *Commonwealth v. Sullivan*, 435 Mass. 722, 726-728 (2002), discussed at Evidence: Witness Testifying under Immunity Grant.

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, REFERENCE TO MISSING WITNESSES

The defendant produced three alibi witnesses at his murder trial. Three others who also were allegedly with the defendant at the time of the murder were not called to testify. The Supreme Judicial Court rejects the argument that the prosecutor's missing witness argument with respect to those three witnesses was improper. *Commonwealth v. Daye*, 435 Mass. 463, 477 (2001). According to the Court, the testimony of these witnesses would not have been "merely cumulative" because "[t]he alibi witnesses who did testify for the defendant were subjected (and vulnerable) to extensive impeachment. In light of the damage done to their credibility, further alibi testimony from noninterested witnesses would have been very important to the defense." *Id.*

PROSECUTORIAL MISCONDUCT: CLOSING ARGUMENT, REFERENCE TO ROBBERY VICTIMS AS "LITTLE GIRLS"

In *Commonwealth v. Poggi*, 53 Mass. App. Ct. 685, 695 (2002), discussed at Identification: Suppression, Suggestiveness, the Appeals Court chides the prosecutor for referring to the employee victims of the robbery as "little girls" and "babies." According to the Court, "care should be taken that sympathy-inspiring terms are not casually used when they have no meaningful bearing on the guilt or innocence of the accused." *Id.* See also *Commonwealth v. Ortiz*, 435 Mass. 569, 579 (2002), where the prosecutor's remark that the defendant "made sure that [the homicide victim] never saw her mother, her fiancé, never returned to her room again, never got married, and never made it to her future mother-in-law's house that afternoon" was an improper appeal based on sympathy but did not amount to reversible error in the circumstances.

PROSECUTORIAL MISCONDUCT: PREMATURE DISCLOSURE OF DEFENDANT'S STATEMENTS BY COMMONWEALTH EXPERT IN INSANITY CASE

After the defendant gave notice that he was raising an insanity defense, the prosecutor's motion to have the defendant examined by his own psychiatric expert was allowed. Following the examination, the prosecution expert prematurely told the prosecutor, without permission from the judge, what the defendant had said during the examination. Defense counsel moved to dismiss the indictments or, in the alternative, to bar the expert from testifying. The motion judge denied the motion. *Commonwealth v. Stroyny*, 435 Mass. 635, 644-646 (2002). The Supreme Judicial Court expresses strong disapproval of the prosecutor's conduct: He "should immediately have terminated any conversation with [the expert] when it became clear that he was divulging communications by the defendant." *Id.* at 645. Nonetheless, the Court upholds the judge's rejection of "so Draconian a measure" as dismissal, since "there were other means available at trial that would protect the defendant from any improper use against him of statements he made to [the expert]." *Id.* Defense counsel argued that the premature disclosure of the defendant's statements gave the prosecutor an advantage in cross-examining him when he took the stand at trial. The Court was unimpressed, finding no prejudice because the defendant's own trial testimony included the same statements he made to the expert. (Precisely the point made by defense counsel, one would think!)

PRACTICE TIP: It seems from the *Stroyny* opinion that there is no remedy for this type of misconduct (which one suspects may be quite widespread), unless the defendant both presents the planned insanity defense and testifies differently from what he said to the prosecution expert. In that event, the prosecutor might be barred from eliciting the inconsistent statements to the expert.

A possible approach to the problem might be to ask the judge to withhold approval of the particular expert when the prosecution next seeks to use him.

SEARCH AND SEIZURE: ARREST WITHOUT WARRANT FOR DOMESTIC ABUSE

Bruised and disheveled, a woman appeared at a Boston police station and reported that she had been struck by her boyfriend and was in fear of further harm from him. Two officers were dispatched to the boyfriend's place of employment where they arrested him. The boyfriend filed a civil suit against the arresting officers and others, alleging, among other things, that the warrantless arrest violated his civil rights. *Richardson v. City of Boston*, 53 Mass. App. Ct. 201 (2001). The Court rules that the warrantless arrest was authorized by G.L. c. 209A § 6(7), which makes arrest of the accused "the preferred response whenever an officer witnesses or has probable cause to believe that a person . . . has committed a misdemeanor involving abuse . . . [or] has committed an assault and battery." The Court rejects the arrestee's claim that this provision is "limited to situations in which a police officer responding to a report of domestic violence must remove the abuser from the scene of the violence in order to protect the victim from further abuse." *Id.* at 207. The Court also concludes that exculpatory statements by fellow employees of the arrestee at the time of arrest (that he "had been at work the whole afternoon") "w[ere] not sufficiently exculpatory to vitiate the previously existing probable cause." *Id.* at 207-208.

PRACTICE TIP: This case tacitly recognizes that important new information acquired by the police may require them to reevaluate whether there is probable cause for a search or arrest. *Id.* at 208. See also *Commonwealth v. Walker*, 370 Mass. 548, 560, cert. denied, 492 U.S. 943 (1976) (reevaluation may be required "if . . . intervening exculpatory facts come to light").

SEARCH AND SEIZURE: EMERGENCY EXCEPTION TO WARRANT REQUIREMENT, DESTRUCTION OF EVIDENCE EXCEPTION

Three days after the victim was last seen alive, an unruly crowd of twenty-five people - mostly friends and relatives of the victim - showed up outside a closed fruit store owned by the defendant. Convinced that the victim was inside, they were intent on forcing their way inside to look for her. The four police officers present at the scene advised them that a warrant was necessary to enter the store and urged them to be patient. Members of the crowd shouted that they did not intend to wait. The officers, concluding that the victim was probably inside the store in need of assistance, and that a warrant was impracticable because the local court was closed, and also fearing that entry by the crowd might result in disturbing the crime scene, forced their way inside, where they found the victim's body. The defendant moved to suppress the fruits of the entry. *Commonwealth v. Ortiz*, 435 Mass. 569, 570-574 (2002). The Court holds that the entry was proper under two

alternative exceptions to the warrant requirement. First, it fell within the “emergency exception,” because there were “objectively reasonable grounds to believe” that the victim was inside and that she “was in trouble, whether injured or dead.” *Id.* at 573. Second, the entry fell within the “destruction of evidence exception,” since the integrity of the crime scene would be threatened if the crowd rushed in as they were threatening to do. “That four officers possibly could have secured the area and prevented a crowd of about twenty people from storming the . . . store . . . is sheer speculation.” *Id.* at 573-574.

SEARCH AND SEIZURE: FRUIT OF POISONOUS TREE, OFFICIAL MISCONDUCT REQUIRED

See *Commonwealth v. Brandwein*, 435 Mass. 623, 631-633 (2002), discussed at Evidence: Privilege: Psychotherapist-patient: Scope, Fruit of Poisonous Tree Analysis Inapplicable.

SEARCH AND SEIZURE: KNOCK AND ANNOUNCE RULE

In *Commonwealth v. Jiminez*, 53 Mass. App. Ct. 902 (2001), further app. rev. granted, 435 Mass. 1109 (2002), the Appeals Court reverses the defendant’s drug trafficking conviction, holding that the information in a search warrant affidavit was insufficient to justify a no-knock entry. The Massachusetts knock and announce rule is more stringent than its federal counterpart, requiring “probable cause,” rather than “reasonable suspicion,” to believe that particular conditions justifying a no-knock entry will be present at the time of execution of the warrant. *Id.* at 903. The Appeals Court was unimpressed by assertions in the affidavit that drug dealers frequently carry weapons and that drugs are easily disposable. These were “generic concerns that are present in most, if not all, such situations.” The Court found noteworthy the absence of particularized information that weapons were present, that there was a lookout posted at the site, or that the extra time expended in knock-and-announce compliance would likely have resulted in the destruction of the drugs - “particularly in view of the fact that the apartment appeared to be an unguarded storage place rather than a setting for the conducting of business.” *Id.* at 904. Finally, the Court noted the officers’ duty to make a threshold reappraisal of the need for a no-knock entry, especially after they discovered that the downstairs door to the building was unlocked and came open with only a small push, thus enabling the police to enter the building and proceed to the third-floor apartment without being heard. *Id.*

SEARCH AND SEIZURE: PROBABLE CAUSE: “FRANKS” HEARING, NEXUS WITH PLACE TO BE SEARCHED

The cocaine in *Commonwealth v. Alcantara*, 53 Mass. App. Ct. 591 (2002), discussed at Crimes: Drugs: Possession, was found and seized during the execution of a warrant based on information from a police informant and a controlled purchase of drugs by the informant. According to the informant, the defendant took drug orders by telephone and delivered the drugs to the buyer at a location set during the phone call. During the controlled buy, a police surveillance officer observed the defendant leave the building in which he occupied a third-floor apartment, approach the informant outside, and deliver drugs to him. These observations provided sufficient nexus with the defendant’s apartment to furnish probable cause to search it, even though the informant was never

inside. “In these circumstances, from this method of operation, it was reasonable to infer for purposes of probable cause that [the defendant] probably kept the drugs he sold in his apartment.” *Id.* at 594. The defendant in *Alcantara* also challenged the informant’s reliability and requested a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). The search warrant affidavit referred to four other warrants in connection with which the informant (“CI 19”) had provided accurate information. Defense counsel’s research showed that three of the four affidavits in support of those warrants failed to refer to “CI 19.” At the *Franks* hearing, the affiant police officer testified that “CI 19” either had not been mentioned at all in those affidavits or had been referred to only as a “citizen” because his reliability had not yet been established. The Court’s decision contains a very concise and helpful summary of the law under *Franks*, *Commonwealth v. Amral*, 407 Mass. 511 (1990), and *Commonwealth v. Douzanis*, 384 Mass. 434 (1981), but the law was of no help to the defendant: The motion judge’s finding that the officer’s testimony was credible was upheld, and the Court noted that “there is no requirement that all information known to the police be used in the affidavit, or that a confidential informant be consistently named or numbered from affidavit to affidavit. Such a requirement could, in some circumstances, jeopardize the anonymity of the informant, and in so doing, jeopardize the informant’s safety.” 53 Mass. App. Ct. at 596.

SEARCH AND SEIZURE: PROBABLE CAUSE: OBLIGATION TO REEVALUATE IN LIGHT OF NEW INFORMATION

See *Richardson v. City of Boston*, 53 Mass. App. Ct. 201, 207-208 (2001), discussed at Search and Seizure: Arrest without Warrant for Domestic Abuse.

SEARCH AND SEIZURE: PROBABLE CAUSE, RELIABILITY OF INFORMANT

In *Commonwealth v. Alfonso A.*, 53 Mass. App. Ct. 279 (2001), further app. rev. granted, 436 Mass. 1101 (2002), the Appeals Court reverses the denial of a juvenile’s motion to suppress the fruits of a search conducted pursuant to a warrant. The Court’s discussion of the veracity prong of the *Aguilar-Spinelli* test is detailed and the burden placed on the prosecution demanding. According to the affidavit in support of the warrant, the informant, “X,” “whose whereabouts and identity were known” to the affiant, but who wished to remain anonymous, told the affiant that he “observed six rifles, three shotguns, two rifles, and one air pellet rifle” at the home in question, and that these weapons were taken “in a Breaking & Entry on the 27th of January, 1999, in West Roxbury.” The affiant confirmed that such a crime had occurred in West Roxbury on that date and that three 12 gauge shotguns, two 20 gauge shotguns and a pellet gun were taken. The Court observed that “[n]one of the common bases for determining reliability” (successful past performance of the informant, a statement against penal interest, or status as “an ordinary citizen”) was set out in the affidavit. *Id.* at 282-283. The Court was unwilling to draw a conclusion of reliability from any of the three factors on which the motion judge relied: (1) The degree of detail supplied by “X” was “not sufficiently accurate or specific to be ‘self-verifying.’” He did not know the last name of the occupants of the home, and his description of the weapons did not jibe with those taken in the January 27 break-in. Moreover, the Court questions the usefulness of uncorroborated detail in determining veracity, quoting Justice Kaplan’s opinion in *Commonwealth v. Oliveira*, 35 Mass. App.

Ct. 645, 648 (1993): “If the informant were concocting a story out of the whole cloth, he could fabricate in fine detail as easily as with rough brush strokes. Minute detail tells us nothing about ‘veracity.’” 53 Mass. App. Ct. at 284. (2) Independent corroboration by the police did not significantly enhance the reliability of the information. In this regard, the Court asserts (and backs up with extensive case citations) that it is only when an informant provides facts that are not publicly known or when he knows of a crime before the police do that his credibility is enhanced. *Id.* at 284-286. Here, “X”’s knowledge of the recent robbery and stolen weapons did not enhance his reliability because that knowledge could have been gained “at a neighborhood bar, or possibly, could have been heard on a local news broadcast, or . . . read in the paper.” *Id.* at 286-287. (3) The assertion by the affiant that “X”’s “whereabouts and identity are known to me” was also unhelpful, since the affiant failed to specify that it came from personal contact, rather than a telephone call, or that he could readily reach him or her. *Id.* at 287. Moreover, “[e]ven where an informant is ‘named’ and his address is given, that is but one factor to be weighed.” *Id.*

SEARCH AND SEIZURE: PROBATION SEARCH

A California state court imposed a condition on the defendant’s probation that he “submit his . . . place of residence . . . to search at any time, with or without a search warrant, warrant of arrest or reasonable cause, by any probation officer or law enforcement officer.” Suspecting the defendant of a series of arsons and being aware of this probation condition, a police officer entered and searched the defendant’s home without a warrant. Federal charges against the defendant ensued, and the defendant’s motion to suppress the fruits of the search eventually came before the U.S. Supreme Court for review. The Court upholds the constitutionality of the search in a unanimous opinion. *United States v. Knight*, 122 S.Ct. 587 (2001). Using “ordinary Fourth Amendment analysis,” *id.* at 593, and approaching the case from a “totality of the circumstances” view, *id.* at 591, the Court notes that the probation condition was a permissible one because it reasonably furthered the primary goals of probation - rehabilitation and protecting society. The defendant’s knowledge of the condition “significantly diminished [his] reasonable expectation of privacy.” Moreover, probationers in general are substantially more likely than other citizens to violate the law and have an even greater incentive than ordinary citizens to conceal evidence of their crimes. Balancing the governmental and private interests involved, the Court concludes that no warrant was required and that no more than reasonable suspicion was needed to permit the search of the defendant’s home. Because it was conceded that the police officer had reasonable suspicion for the search, the Court finds it unnecessary to consider whether his purpose was related to the probation or not.

SEARCH AND SEIZURE: PROTECTIVE MEASURES BY POLICE DURING TRAFFIC STOP OF SUSPECTED FELON

Four rapes or attempted rapes occurred in Everett in the space of five days. The suspect was described as an Hispanic male, 5’6" or 5’7" tall, medium build with a small mustache, driving a black or dark blue Jeep Cherokee - possibly with gold trim. Fifteen minutes after the last of the four incidents, an Everett police officer saw and stopped the defendant for driving his black, gold-trimmed Jeep Cherokee the wrong way on a one-

way street. After calling for backup, the officer approached the vehicle with his gun drawn, ordered the defendant out of the car, and handcuffed him. *Commonwealth v. Santiago*, 53 Mass. App. Ct. 568 (2002). The Appeals Court holds that, because the defendant matched the description of the armed felon, these actions by the officer were reasonable precautions for his own protection and did not convert the vehicle stop into an arrest requiring probable cause. *Id.* at 570-571. More controversially, the Court holds that the officer was also permitted to take the further protective step of entering the defendant's car to look for weapons even after the handcuffed defendant was seated in the backup cruiser under the watch of two other officers. The rationale offered by the Court for this conclusion is that *Terry* stops frequently end with the release of the suspect, and the officer was "not required to risk becoming a victim upon the suspect's reentry into the vehicle." *Id.* at 571. The flaw in the Court's logic seems to be twofold: First, the defendant's release would probably be preceded by an unsuccessful show-up identification attempt by the latest victim or by other investigatory steps that reduced the suspicion aimed at the defendant; and second, why would the officer have anything to fear from the defendant if the defendant were being released?

SEARCH AND SEIZURE: PROTECTIVE "PAT FRISK"

Officers of the Springfield police department's gang suppression unit approached a group of youths - some wearing Latin King colors - who were congregating in a high crime area of the city. The officers' intent was to advise the youths that they were violating a city anti-loitering ordinance and to ask them to move along. Before doing so, however, the officers pat-frisked each of the group and, in the course of doing so, found a double-edged knife on the juvenile defendant. The defendant was adjudicated delinquent for carrying a dangerous weapon and appealed. The Appeals Court reverses, finding that the defendant's motion to suppress the knife should have been allowed because there was no justification for the stop of the defendant or for a protective pat frisk. *Commonwealth v. Pierre P.*, 53 Mass. App. Ct. 215 (2001). With respect to the frisk, the Court observes that "[a] police officer may frisk a person with whom he *necessarily* comes into contact if he reasonably considers that person to be dangerous." *Id.* at 217 [emphasis supplied]. Here, the record showed no necessity to come into contact with the defendant in order to disperse the group of which he was a part. The Court also found that there was no reasonable suspicion to justify a stop of the youths for allegedly violating the anti-loitering ordinance, since the evidence did not establish that they were obstructing, hindering, or preventing others from passing, as required by the language of the ordinance. Moreover, under the language of the ordinance, the officer should have done no more than ask the youths to move along. *Id.* at 218. In condemning the police action here, the Court quotes *Commonwealth v. Cheek*, 413 Mass. 492, 497 (1992): "To permit police investigative stops under the sparse facts present in this case would be to encourage unduly intrusive police practices. The problems that may face the . . . 'high crime area' will not be resolved any more readily by excluding the individuals who live there from the protections afforded by our Constitution."

SEARCH AND SEIZURE: REASONABLE SUSPICION, POLICE DISPATCH

Acting on a radio dispatch that two cars had been observed "by an off-duty police officer" to be driving erratically, a Westborough police officer followed the cars for a

short distance, but witnessed no driving infractions. He nonetheless stopped one of the cars, driven by the defendant, who proved to be intoxicated and was ultimately convicted of driving under the influence. The Appeals Court overturned the denial of the defendant's motion to suppress the police stop of his car and ordered that a judgment of acquittal be entered because, without the evidence gained from the improper stop, there was no evidence to justify a conviction. *Commonwealth v. Riggieri*, 53 Mass. App. Ct. 373 (2001), further app. rev. granted, 435 Mass. 1109 (2002). At the suppression hearing, the arresting officer testified that the dispatch purported to be based on a cell phone call from an off-duty officer who said he was following the suspect vehicles. "If the police are relying on a radio transmission as grounds for the stop, there must be evidence presented at the suppression hearing as to its reliability." *Id.* at 376, quoting *Commonwealth v. Medeiros*, 45 Mass. App. Ct. 240, 242 (1998). The Court held that the prosecution failed to meet this burden because neither the dispatcher nor the off-duty officer testified at the hearing, and the arresting officer did not himself acquire information confirming that the caller was, in fact, an off-duty officer until after the defendant's car was stopped.. The arresting officer's own observations did not provide sufficient police corroboration to cure this gap, since he saw nothing improper in the defendant's driving before he stopped the car. The Supreme Judicial Court has granted the prosecution's application for further appellate review of this decision.

PRACTICE TIP: This opinion serves as a helpful reminder that a police radio dispatch is only as good as its ultimate source. Or more precisely, it is only as good as the evidence at the suppression hearing shows its ultimate source to be. At the suppression hearing, the burden rests on the prosecution to produce someone with first-hand knowledge to establish the source and reliability of the telephone call or other information that formed the basis for the radio dispatch. *Commonwealth v. White*, 422 Mass. 487, 496 (1996); *Commonwealth v. Willis*, 415 Mass. 814, 818 (1993); *Commonwealth v. Antobenedetto*, 366 Mass. 51, 56 (1974). It is not uncommon for prosecutors to overlook this burden. See, for example, *Commonwealth v. Cheek*, 413 Mass. 492, 494-495 (1992) ("the Commonwealth presented no evidence as to the source of the information on which the radio call was based").

SEARCH AND SEIZURE: STOP, EXTRATERRITORIAL

An Amesbury police officer observed the defendant driving at an excessive rate of speed and followed him into Salisbury, where he continued to speed, illegally passing another car in a no-passing lane and driving "erratically." The officer reported his observations to the Salisbury police and ultimately stopped the defendant at their request. The defendant, charged with driving while intoxicated moved to suppress the fruits of the stop, alleging that the Amesbury officer had no authority to make the extraterritorial stop. *Commonwealth v. Twombly*, 435 Mass. 440 (2001). Under the common law, a police officer may not act outside his or her jurisdiction unless specifically authorized by statute or in the performance of a valid citizen's arrest. *Id.* at 442. Reversing the decision of the Appeals Court, 50 Mass. App. Ct. 667 (2001), the Supreme Judicial Court finds the necessary statutory authority in G.L. c. 37, § 13. That statute permits sheriffs and their deputies to "require suitable aid in the . . . preservation of the peace . . . [or] in the apprehending or securing of a person for a breach of the peace." The officer's actions

here provided aid “in the preservation of the peace,” a phrase which the Court interprets to mean “to keep the peace, to prevent injury, harm, or destruction.” *Id.* at 443. The officer’s intervention was a necessary response to the defendant’s manner of operating his vehicle, which “was at least raising an imminent and substantial danger to others on the road.” *Id.* at 444.

SENTENCING: DATE OF OFFENSE FOR TRUTH IN SENTENCING PURPOSES, AMENDMENT TO MITTIMUS.

A lawyer pled guilty to fifteen counts of larceny over \$250 and was adjudicated a “common and notorious thief,” G.L. c. 266, § 40. The effect of this adjudication was to “consolidate the [fifteen separate larceny] convictions, and to render one judgment upon them, as upon one substantive offense.” *Commonwealth v. Clark*, 53 Mass. App. Ct. 342 (2001). The defendant was sentenced to seven to eight years in state prison for this consolidated offense. (The statutory maximum is twenty years.) An issue arose because two of the fifteen larcenies were committed before July 1, 1994 - the effective date of the Truth in Sentencing Act., St. 1993, c. 432. Under the law in effect before Truth in Sentencing, he would have been eligible for parole on this non-violent offense after serving only one-third of the seven year minimum term imposed by the plea judge; he would also have received five months per year of statutory good time which would have allowed him to “wrap up” the whole sentence after only four years and eight months. The mittimus issued by the clerk’s office listed a 1993 date of offense. Twenty-two months after the plea, the prosecutor moved to correct the mittimus under Mass. R. Crim. P. 42. The plea judge allowed the motion and directed “that the sentence . . . be governed by truth in sentencing, as thirteen of the fifteen larceny offenses occurred . . . after July 1, 1994.” Because the judge had told the defendant at sentencing that he would have to “serve seven full years at Cedar Junction,” the Appeals Court had no difficulty concluding that the amendment of the mittimus was not an untimely (and therefore impermissible under Mass. R. Crim. P. 29[a]) revision of the sentence in light of subsequent events. Instead, it was permissible under Rule 42 as a clerical correction to conform the mittimus to the sentence actually imposed. Since only three larceny counts are required to adjudicate a defendant a common and notorious thief, the thirteen post-July 1, 1994 counts were more than sufficient to sustain the adjudication and justify a sentence under the Truth in Sentencing Act. The defendant would have gained nothing (other than possible exposure to additional prison time) if the two earliest larceny counts had been excluded from the common and notorious thief adjudication. He told the plea judge that he understood that the disposition (which was agreed-upon) would require him to “serve seven full years.” Under these circumstances, the judge’s treatment of the sentence as governed by Truth in Sentencing was appropriate.

SENTENCING: MOTION TO REVISE OR REVOKE

A pro se defendant brought a motion to revise or revoke under Mass. R. Crim. P. 29 claiming that the sentencing judge had coerced him to plead guilty. It was clear from the motion that what the defendant wanted was to overturn his plea. A Rule 29 motion is not an appropriate vehicle for an attempt to withdraw a plea. The purpose of the rule “is to permit a judge to reconsider a sentence imposed to determine, in the light of the facts as they existed at the time of the sentence, whether the sentence was just.” *Commonwealth*

v. Gaumond, 53 Mass. App. Ct. 912 (2002). The proper vehicle for what the defendant sought to do was a motion under Mass. R. Crim. P. 30(b). It is unclear from the opinion why the Court did not treat his motion as such a motion. See, for example, *Commonwealth v. Christian*, 46 Mass. App. Ct. 477, 481, S.C., 429 Mass. 1022 (1999) (“We interpret a pleading in accordance with its substance, not its label.”)

SENTENCING: PROBATIONARY CONDITIONS

The defendant, convicted of indecent assault and battery upon his fifteen-year-old daughter, challenged the conditions of his twenty year probation which prohibited him, among other things, from (1) being alone with any minor children, including his grandchildren and one of his own three minor children, and (2) residing with any minor children, including two of his own children and any future children he might have. *Commonwealth v. Lapointe*, 435 Mass. 455 (2001). At the outset, the court observed that it had the authority to review the probationary conditions on the defendant’s direct appeal and would do so because of the “issues of public interest” raised. However, the court suggested that an appeal to the Appellate Division of the Superior Court or a motion under Mass. R. Crim. P. 30 is a more appropriate vehicle for challenging probationary conditions. *Id.* at 458-459. The defendant challenged the probationary conditions as infringing on his constitutionally protected parental rights. The court rejected this challenge, reciting that “[a] probation condition is enforceable, even if it infringes on a defendant’s ability to exercise constitutionally protected rights, so long as the condition is ‘reasonably related’ to the goals of sentencing and probation.” *Id.* at 459. The conditions here were properly crafted to aid the defendant’s rehabilitation and deter future crimes by removing him from situations in which he might be prone to re-offend. *Id.* at 460-461. Important to this conclusion was the fact that the defendant’s offenses had occurred in his own home and were directed at a family member. Also important was the sentencing judge’s expressed willingness to entertain a modification in light of any future events. The twenty-year probationary term does not, according to the court, “shock the conscience [or] offend fundamental notions of human dignity.” *Id.* at 462.

SENTENCING: TIME-SERVED CREDIT, OUT-OF-STATE JAIL TIME WHILE AWAITING EXTRADITION

In *Commonwealth v. Beauchamp*, 413 Mass. 60, 62 (1992), the Supreme Judicial Court held that a defendant is not entitled to time-served credit for time spent in jail in another state while fighting his extradition to Massachusetts. In such circumstances, the credit only begins to accrue after the extradition litigation ends. The Appeals Court now holds that, in cases in which the defendant does not contest extradition, time-served credit does not begin to accrue until the defendant actually signs a written extradition waiver. *Commonwealth v. Frias*, 53 Mass. App. Ct. 488 (2002). The upshot of this ruling is that a defendant who does not contest extradition but simply waits to see if the Commonwealth will go to the trouble of obtaining a governor’s warrant will not begin to accrue time-served credit until the warrant is received by the asylum state. The ruling is based on the understanding that, under the Uniform Criminal Extradition Act (“UCEA”), a defendant arrested on a fugitive warrant is brought before a court of the asylum state upon his arrest and offered the opportunity to sign a waiver of extradition; and that he may thereafter “at any point express his decision to waive extradition and request a court

appearance to exercise the UCEA waiver before a judge.” *Id.* at 493. The Court notes that a defendant who “is able to demonstrate that he was unable to execute the waiver of extradition due to circumstances beyond his control” would be entitled to additional credit. *Id.* at 493-494 n.9.

SEXUAL ASSAULT: ASSAULT WITH INTENT TO RAPE

In *Commonwealth v. Santiago*, 53 Mass. App. Ct. 568, 574-575 (2002), the Court holds that evidence of the defendant’s intent to rape the complainant could permissibly be inferred from his efforts (including a threat with a knife) to get her into his car, the absence of any other motive for doing so, and, perhaps most importantly, “the evidence that he had in fact raped two other young women within a matter of days.”

SEXUAL ASSAULT: FRESH COMPLAINT

In *Commonwealth v. Oliveira*, 53 Mass. App. Ct. 480 (2002), discussed at Double Jeopardy: Duplicative Convictions, the trial judge erred when he failed to repeat his fresh complaint instruction before the second of two fresh complaint witnesses testified. However, defense counsel did not object, and the error did not create a substantial risk of a miscarriage of justice, since the second witness testified only minutes after the brief testimony of the first and the judge gave a proper fresh complaint instruction in his charge.

SEXUAL ASSAULT: FRESH COMPLAINT, “OPENING DOOR” TO STALE COMPLAINT; PERMISSIBLE SCOPE; “PILING ON”

In *Commonwealth v. Aspen*, 53 Mass. App. Ct. 259, 265-269 (2001), the defendant was accused of raping his stepdaughter both when she was a teenager and then later - after a six-year hiatus - when she was in her twenties. The stepdaughter’s complaint about the rapes that occurred when she was a teenager was stale, and defense counsel’s motion to exclude it was allowed. However, when defense counsel, in an effort to impeach the complainant’s credibility, cross-examined a police detective about the complainant’s report of those rapes, he “opened the door,” and the prosecutor “was entitled to rebut the inference that the [complainant] was not credible by briefly eliciting other details” of the complaint. *Id.* at 266. With respect to the later rapes, the judge allowed fresh complaint testimony by seven witnesses and let three of them testify that the complainant told them that she did not report the rapes sooner because the defendant had threatened to kill her and members of her family if she did. Though it was harmless error, the latter testimony was held to be impermissible as fresh complaint evidence because it went beyond the complainant’s statements as to “the facts of the assault.” *Id.* at 266-267. As for the defendant’s “piling on” claim, four of the witnesses only testified without further detail that the complainant told them that the defendant had sexually molested her, and each of the other three testified to different instances of rape which the complainant had described to them. In light of this and “the judge’s careful limiting instructions,” the Appeals Court rejects the “piling on” claim. *Id.* at 266-267. However, the Court “again urge[s] trial judges to carefully screen the number of fresh complaint witnesses and the content of their testimony before they appear as witnesses.” *Id.* at 269.

SEXUAL ASSAULT: OPEN & GROSS LEWDNESS; LEWD, WANTON & LASCIVIOUS PERSON

A juvenile special education student made a series of sexual propositions to a 16-year old female classmate who was assigned to tutor him in a classroom cubicle. Ultimately, the juvenile exposed himself to the girl. As a result of his actions, he was adjudicated delinquent for violating G.L. c. 272, § 53 (“lewd, wanton and lascivious persons in speech or behavior”) and G.L. c. 272, § 16 (“open and gross lewdness and lascivious behavior”). *Commonwealth v. Guy G.*, 53 Mass. App. Ct. 271 (2001). The Appeals Court rejects the juvenile’s argument that the evidence did not show that his acts were committed in a “public place,” as required by § 53. That issue turns not on whether the location was “intrinsically public or private,” but on “whether the actor in the given circumstances was being recklessly indifferent to a substantial chance that others would observe the act and might be offended by the sight.” *Id.* at 275. Evidence that the cubicle in which the acts occurred was “partitioned for privacy but . . . not closed and could readily be entered,” that two students were at tables outside the cubicle and could have seen inside it by standing, and that a teacher would “rotate” between the room in which the cubicle was located and an adjoining room was sufficient to make the “public place” question one for the jury. (The Appeals Court notes the juvenile’s own testimony that it was “not uncommon for . . . someone [to] come[] in to see what you’re doing.” However, that testimony should not properly be considered in deciding the sufficiency of the evidence at the close of the prosecution’s case.) With respect to the § 16 adjudication, the Court easily rejects the juvenile’s claim that the evidence was insufficient to show that the “act was done in such a way as to produce shock and alarm” and that the student tutor was “in fact alarmed or shocked” by it. *Id.* at 274. Concerned that the felony-level § 16 delinquency adjudication would subject the juvenile to registration as a sex offender and would also result in his expulsion from school, defense counsel filed a post-trial motion under Rule 25(b)(2) asking that the § 16 delinquency be reduced to the lesser offense of indecent exposure, G.L. c. 272, § 53 - a misdemeanor punishable by no more than six months in a jail or house of correction. The trial judge denied the motion - apparently because he doubted his authority to reduce the charge to one which had not been presented to the jury. The Appeals Court reverses the denial of the motion, holding that the failure to charge the jury on the offense did not affect the judge’s authority under Rule 25(b)(2), and that indecent exposure is a lesser included offense of § 16. *Id.* at 275-278. “[T]he § 16 offense is an aggravated form of indecent exposure, the § 16 offense being often charged where the victim is a child, although not thus limited.” *Id.* at 278 n.13. The § 16 adjudication was remanded to the trial judge so that he could exercise his discretion on the motion, unhindered by his former misconception as to his authority.

SEXUALLY DANGEROUS PERSON: LACK OF CONTROL REQUIRED

In *Kansas v. Crane*, 122 S.Ct. 867 (2002), the Supreme Court revisits the Kansas SDP statute which it considered in *Kansas v. Hendricks*, 521 U.S. 346 (1997). The Kansas Supreme Court had interpreted *Hendricks* as requiring proof that an SDP defendant “cannot control” his sexually dangerous behavior. The U.S. Supreme Court now rules that, in order to distinguish a dangerous sexual offender subject to civil commitment from other dangerous recidivists who are more properly dealt with only by criminal

prosecution, it is enough for constitutional purposes to show that the offender has a mental abnormality which creates for him a “serious difficulty in controlling behavior.” 122 S.Ct. at 870. While not setting any concrete minimum level of severity for this difficulty, the Court observes that the difficulty, “when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical

recidivist convicted in an ordinary criminal case.” *Id.* The Court declines to decide whether SDP confinement may constitutionally be based on lack of control due to a purely “emotional” (as opposed to “volitional” or “cognitive”) abnormality. *Id.* at 871-872.

SEXUALLY DANGEROUS PERSON: TIME LIMITS FOR ADJUDICATING

One day before the defendant’s scheduled release from prison, the prosecution filed a petition for his commitment as a sexually dangerous person. Probable cause was found, and the defendant was committed to the Massachusetts Treatment Center for examination by two qualified examiners (“QE”s). The SDP proceedings were stayed on three separate occasions while the defendant pursued various appellate remedies. There were, however, three separate intervening periods - each exceeding 45 days - during which he was at the treatment center and yet no report was filed with the court by the QEs. The last of these three time periods was marked by a decision of a superior court judge refusing to dismiss the SDP petition due to the delay but ordering that the defendant be examined “immediately.” Fifty-two days after this order was issued - fifteen months after the original commitment order - the QEs had still not filed any report and the defendant moved again to dismiss the petition. His motion was allowed this time. *Commonwealth v. Kennedy*, 435 Mass. 527 (2001). The Supreme Judicial Court affirms the dismissal of the petition. In doing so, it points out that the statute clearly requires that QE’s “‘shall’ file written reports no later than forty-five days after commitment.” *Id.* at 530. The delays in this case were extreme, and the Court had no difficulty affirming the dismissal. In a footnote, the Court remarks that it “need not consider whether lesser violations of the deadlines in G.L. c. 123A may result in some lesser sanction.” *Id.* at 530 n.3. However, the Court gives defendants ammunition to argue for dismissal in cases of less extreme delays: “The word ‘shall’ in this context, where substantive rights are involved, indicates that the action is mandatory. This imperative is at its strongest in such cases.” “[C]onfinement without legal justification is never innocuous.” *Id.* at 530. The argument for dismissal is most compelling when, in spite of the six-month advance warning of a defendant’s impending release which the prosecution receives from D.O.C., a defendant is detained beyond his discharge date due to the pending SDP proceedings. In such cases, “the liberty interests at stake compel strict adherence to the time frames set forth in the statute.” *Id.* at 531.

TRIAL PRACTICE: CONTINUANCE, WAIVER OF COUNSEL

On the morning of trial, defense counsel requested a continuance of the case (the only one scheduled for trial that day) and appointment of new counsel for the defendant due to a breakdown in the attorney-client relationship. The trial judge denied the continuance and gave the defendant the choice of proceeding with his present attorney or pro se with that attorney as standby counsel. The defendant chose the latter, and his conviction ensued. The Appeals Court affirms and, in the process of doing so, offers a road map for dealing with this not uncommon scenario. *Commonwealth v. Carsetti*, 53 Mass. App. Ct. 558 (2002). Among the points made by the Court: (1) “[T]he obligation to come forward and inform the trial judge of the need for a continuance prior to the date of trial rests on counsel, not the defendant.” Failure to do so is arguably an ethical violation. *Id.* at 560 & n.2. (2) Counsel is obliged to be ready for trial when scheduled, unless allowance of

his withdrawal is certain. If a continuance must be granted because counsel is unprepared for trial, financial sanctions against counsel may be appropriate. *Id.* at 560 n.3. (3) The defendant must be permitted to address the judge as to his reason for wanting new counsel. *Id.* at 561. (4) Resolution of the defendant's request turns on a balancing of the defendant's right to obtain counsel of his choice and the public's interest in the fair, efficient and orderly administration of justice. A disagreement over counsel's choice of trial tactics is ordinarily not sufficient. Counsel's unpreparedness for trial is always sufficient. *Id.* at 561-562. (5) When the defendant alleges that counsel is unprepared, the judge should conduct a colloquy with the defendant and with counsel to ascertain whether this is accurate. *Id.* at 562-563. (6) The judge should make formal findings on the record concerning counsel's

preparedness and the balancing of the defendant's and the Commonwealth's interests. However, the failure to do so is not fatal where, as here, the judge's rationale can be "glean[ed] from the record." *Id.* at 563.

The judge's action in forcing the defendant to choose between going to trial with his present counsel or proceeding pro se was also permissible. "[A] refusal *without good cause* to proceed with able appointed counsel is a 'voluntary' waiver" of counsel. *Id.* at 564. "Good cause includes, but is not limited to, a conflict of interest, incompetence of counsel, or an irreconcilable breakdown in communication." *Id.* Here, counsel maintained there was a breakdown in communication. While noting that the Sixth Amendment guarantees only effective assistance of counsel and not a "meaningful attorney-client relationship," the Appeals Court does not rest its decision on the absence of such a breakdown. Instead, the Court relies on the evidence of guilt - so overwhelming, according to the trial judge, that the defendant "could have had Clarence Darrow and it wouldn't have made a difference" - and holds that the defendant has failed to show how he was "likely deprived . . . of an otherwise available, substantial ground of defense." *Id.* at 564-565, quoting *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974). (The Court does not address whether the denial of counsel to the defendant was "structural error," so that reversal would be required regardless of the strength of the prosecution's case. See *Commonwealth v. Villanueva*, 47 Mass. App. Ct. 905, 906 [1999].) The Court also relies on the defendant's long history of involvement in the criminal justice system - his record "[went] back to the Johnson administration" and included charges similar to those on trial - and his competent representation of himself at trial as proof that his waiver of counsel in fact was knowing and voluntary. *Id.* at 565-566. (The Court does not explain how these factors impact on the voluntariness of the waiver when his only alternative to representing himself was to proceed to trial with counsel who was unable to represent him due to a breakdown in the attorney-client relationship.) For a case in which a defendant in probate court proceedings to terminate his parental rights was forced to make a similar choice between proceeding with current appointed counsel or representing himself and made the same choice with analogous results, see *Adoption of Olivia*, 53 Mass. App. Ct. 670, 671-677 (2002). The Appeals Court applied the criminal case law and reached the same result as in *Carsetti*.

TRIAL PRACTICE: DISCHARGE OF JUROR, RIGHT OF DEFENDANT TO BE PRESENT

On the second day of trial of a first degree murder case, a juror told the judge at sidebar (outside the hearing of the defendant) that she could not look at photographs introduced in evidence and was having difficulty listening to the testimony. She said she could not sleep, was "physically sick," and could "not do what need[ed] to be done." The judge properly decided to excuse the juror. *Commonwealth v. Sleeper*, 435 Mass. 581, 588-590 (2002). While the defendant had a right to be present at the sidebar voir dire which led to the juror's discharge, his absence did not "automatically constitute reversible error." The standard of review for such an error is the "harmless beyond a reasonable doubt" standard. That standard was met here, since the decision to discharge the juror was clearly appropriate and would not have been altered by the defendant's presence at the sidebar voir dire. *Id.* at 589. The Court distinguishes this case from one in which the

jury has begun deliberations. In the case of a deliberating juror, a defendant who is not present must be advised of the matter and given an opportunity for input through counsel on the decision to discharge the juror. See *Commonwealth v. Martino*, 412 Mass. 267, 286-287 (1992). The reason for the distinction is that there is a concern that “a [deliberating] juror may seek discharge based on hardship or illness when his opinion of the defendant’s guilt is not in accord with the opinions of the other jurors.” 435 Mass. at 589-590, quoting *Commonwealth v. Olszewski*, 416 Mass. 707, 722 n.15 (1993), cert. denied, 513 U.S. 835 (1994).

TRIAL PRACTICE: RECUSAL OF JUDGE

A trial judge did not abuse his discretion in declining to recuse himself from the defendant's trial, where he had briefly been involved as a prosecutor in an unrelated case against the defendant five years before but had no recollection of the underlying circumstances of the case. *Commonwealth v. Daye*, 435 Mass. 463, 468 (2001).

TRIAL PRACTICE: VOIR DIRE OF DELIBERATING JURORS, RIGHT OF DEFENDANT AND COUNSEL TO BE PRESENT

On the morning of the second day of jury deliberations in the long and complicated trial of a psychiatrist charged with Medicaid fraud, the Boston Herald printed a page 10 article about the trial. The court reporter and counsel had not yet arrived, but the trial judge intercepted the jurors as they arrived at the courthouse and individually asked each if they had read the article. None had. He took newspapers from several of the jurors, determined they had not been read, cut out the offending article, and returned them to the jurors. When all parties were present, the judge informed counsel and the defendant what had occurred, denied defense counsel's request for a more detailed, on-the-record, voir dire of the jurors, and strongly charged the jurors to disregard anything they might hear outside the evidence. The Appeals Court upholds the judge's actions. *Commonwealth v. Mimless*, 53 Mass. App. Ct. 534, 535-537 (2002). While a defendant's constitutional rights of confrontation and a fair trial entitle him and his attorney to be present whenever the "judge conducts an inquiry about a consequential matter," their absence does not automatically constitute reversible error. The judge's actions here were reasonable in light of the circumstances and the unavailability of the defendant and counsel at the time.

WITNESS: COMPETENCE

The complainant - five years old at the time of trial - testified that the twelve-year-old juvenile defendant had orally and anally raped him. Trial counsel did not request, and the judge did not conduct, any voir dire as to the complainant's competence to testify. *Commonwealth v. Ike I.*, 53 Mass. App. Ct. 907 (2002). The test for competence of a witness is two-pronged: the witness must have (1) the "capacity to observe, remember, and give expression to that which [he or] she ha[s] seen, heard, or experienced;" and (2) "understanding sufficient to comprehend the difference between truth and falsehood. . . . and the obligation and duty to tell the truth, and in a general way, belief that failure to perform the obligation will result in punishment." *Id.* at 908-909. On direct examination, the complainant was asked if he knew the difference between the truth and a lie. He responded, "I'm really five, and this is a lie: I'm six." That exchange was sufficient to establish his understanding of the difference between truth and falsehood. On cross-examination, he said that what the defendant did to him was bad "[b]ecause God will punish you." According to the Court, "[f]ear of punishment for one type of wrongdoing translates into another. A child witness does not have to understand fully the obligation of an oath, but must show a general awareness of the duty to be truthful." *Id.* at 909. The complainant's responses here were sufficient in that regard.

PRACTICE TIP: Always request - preferably, in limine - a voir dire hearing of a young child before the child is allowed to testify. Even if the child is found competent to testify, the voir dire hearing will give you a chance to see and hear the child answer

questions before he testifies at trial, and it may give you insight into how to approach your cross-examination of him.